CONSTITUTIONAL AMENDMENT RESERVING STATE CONTROL OVER PUBLIC SCHOOLS

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

EIGHTY-SIXTH CONGRESS

FIRST SESSION

ON

S. J. Res. 32

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES RESERVING TO THE STATES EXCLUSIVE CONTROL OVER PUBLIC SCHOOLS

MAY 12, 13, 14, 15 AND 21, 1959

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CONSTITUTIONAL AMENDMENT RESERVING STATE CONTROL OVER PUBLIC SCHOOLS

TUESDAY, MAY 12, 1959

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:15 a.m., in room 457, Senate Office Building, Hon. Estes Kefauver (chairman of the subcommittee) presiding.

Present: Senators Kefauver and Dodd.

Also present: Senator John Stennis; Bernard Fensterwald, Jr., subcommittee counsel; and Kathryn Coulter, subcommittee clerk.

Senator KEFAUVER. The committee will come to order.

This morning the Subcommittee on Constitutional Amendments of the Committee on the Judiciary begins hearings on Senate Joint Resolution 32, a resolution introduced by Senator Talmadge and eight other Senators, to wit: Mr. Byrd and Mr. Robertson of Virginia; Mr. Johnston of South Carolina; Mr. Hill and Mr. Sparkman of Alabama; Mr. Eastland and Mr. Stennis of Mississippi; and Mr. Long of Louisiana.

On April 10, 1959, I placed in the Congressional Record a formal announcement of these public hearings on Senate Joint Resolution 32. I think it would be appropriate to have the insert from the Congressional Record printed at this point in the record. (Congressional Record, pp. 5016–5017.)

NOTICE OF HEARING—AMENDMENT TO CONSTITUTION CONCERNING PUBLIC SCHOOL ADMINISTRATION

Mr. KEFAUVER. Mr. President, I wish to announce that the Subcommittee on Constitutional Amendments, of which I have the honor to be chairman, will begin hearings on Senate Joint Resolution 32 at 10 a.m. on May 12. This resolution, which was introduced by the junior Senator from Georgia [Mr. Talmadge], for himself and eight other Senators, proposes an amendment to the Constitution with respect to public school administration. As the text of the proposed amendment is short, I ask unanimous consent that its text be printed at this point in my remarks.

There being no objection, the joint resolution was ordered to be printed in the Record, as follows:

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein)*, That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as a part of the Constitution when ratified by the legislatures of three-fourths of the several States:

"'ARTICLE—

"'Administrative control of any public school, public educational institution, or public educational system operated by any State or by any political or other subdivision thereof, shall be vested exclusively in such State and subdivision and nothing contained in this Constitution shall be construed to deny to the residents thereof the right to determine for themselves the manner in which any such school, institution, or system is administered by such State and subdivision.'"

Mr. KEFAUVER. Mr. President, the hearings will be held in room 457, Old Senate Office Building. Persons who wish to give public testimony should inform the subcommittee's counsel, Mr. Bernard Fensterwald, Jr., whose address is U.S. Senate Post Office, U.S. Senate, Washington 25, D.C.

Senator KEFAUVER. The other members of this subcommittee are: Senator Dodd of Connecticut, who is with us this morning, Senator Hennings of Missouri, Senator Eastland of Mississippi, Senator Langer of North Dakota and Senator Dirksen of Illinois.

Unfortunately, the other members of the subcommittee are either at the White House or in other important committee meetings where they are presiding and are not here at the present time, but we hope during the course of the hearings that they will be here as much of the time as possible.

I am sure our witnesses will understand the fact that all Senators are on several committees or subcommittees, which makes it difficult for all Senators to be present at any one meeting.

This proposed amendment deals with a most important problem about which there is considerable confusion. I think that good discussion by intelligent persons is always helpful in clarifying any problem.

This amendment is, in fact, an amendment to the 14th amendment, and I think that the 14th amendment should be placed in the record at this point.

(The 14th amendment is as follows:)

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SEC. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being 21 years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens 21 years of age in such State.

SEC. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a Member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SEC. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions, and bounties for services in

suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SEC. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Senator KEFAUVER. Undoubtedly in the discussion we will have considerable to say about certain Supreme Court decisions, particularly *Plessy* v. *Ferguson*, 163 U.S. 537, which was decided in 1896, the opinion being written by Justice Brown with a dissent by Mr. Justice Harlan. Justice Brewer did not participate in the decision. The opinion in this case, together with the dissent, will be printed in full in appendix A to this record.

The decision of the Supreme Court in *Brown* v. *Board of Education*, 347 U.S. 483, decided in May 1954, will be printed in full, the opinion in that case being by Mr. Chief Justice Warren. (See app. B.)

The second decision in the case of *Brown* v. *Board of Education*, May 31, 1954, reported in 349 U.S. at 294, will also be printed in the appendix of the record. (See app. B.)

Our very able counsel for the subcommittee is Mr. Bernard Fensterwald, Jr.

These hearings will be thorough and fair, and they shall be conducted in a constructive and dignified manner. It is my earnest desire that the witnesses will shed much light on this proposed amendment.

I trust that no witness will attempt to use this subcommittee as a platform to stir up tensions and hatred. Also, I hope that all witnesses favoring this proposal will avoid any statement or language which might invite legislative proposals of a retaliatory nature. I know that Senator Talmadge, the chief sponsor of this amendment, shares my hope.

At the outset, I wish to thank Senator Talmadge for his fine cooperation toward this end, and I now call upon him to be our first witness and to explain his proposed amendment.

STATEMENT OF HON. HERMAN TALMADGE, A U.S. SENATOR FROM THE STATE OF GEORGIA

Senator TALMADGE. Thank you, Mr. Chairman, and members of the Subcommittee on Constitutional Amendments of the Judiciary Committee.

First, I wish to express my deep gratitude to this subcommittee for its decision to hold comprehensive hearings on the proposed constitutional amendment which eight of my colleagues and I are sponsoring to restore State and local control over public education.

The language of S.J. Res. 32 speaks for itself in declaring clearly and unequivocally its purpose. It proposes to add to the Constitution of the United States a new article to read as follows:

Administrative control of any public school, public educational institution, or any public educational system operated by any State or by any political or other subdivision thereof, shall be vested exclusively in such State and subdivision and nothing contained in this Constitution shall be construed to deny to the residents thereof the right to determine for themselves the manner in which any such school, institution, or system is administered by such State and subdivision.

The issue with which this proposed amendment seeks to deal affirmatively is without a doubt the most momentous and far reaching of our time. It affects the lives of all Americans of all ages and the manner in which it is resolved will have an incalculable impact upon the future of our Nation and its people.

It is true that the question is one which more immediately concerns the people of the South, but I submit to this subcommittee that its ramifications are national rather than regional in scope. That is true because if the people of the South can be denied control over their public schools today, the people of the North, East, and West can likewise be denied control over their public schools on the same grounds or other grounds tomorrow.

It will be argued, of course, that the States and their citizens already have exclusive control over the public educational institutions—an argument which undoubtedly will be news to the parents and school boards of Little Rock, Ark., and Front Royal, Va.

Historically and legally that argument should be true. And, if the Constitution of the United States were properly interpreted and applied with respect to education, it would be true.

The Constitution by both content and intent makes it clear beyond any doubt that one State cannot enjoy a right or exercise a power denied to another.

Paragraph 1, section 2, article IV provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States" and the 10th amendment of the Bill of Rights reserves to the States and the people all "powers not delegated to the United States by the Constitution nor prohibited by it to the States."

If those two passages mean word-for-word what they say—and I know of no other way by which any instrument of law can be interpreted either intelligently or fairly—all of the States of the United States of America were vested with absolute control over all matters relating to education.

There can be no other conclusion in view of the fact that control of education is one of those powers which the Constitution neither delegated to the Federal Government nor prohibited to the States.

There was no other interpretation until the Supreme Court on May 17, 1954, usurped the amendatory authority of Congress and the States and sought to change the explicit and unqualified language of the Constitution by an unconstitutional edict which amounted, in effect, to a judicial constitutional amendment.

As a result we have the ludicrous situation of two branches of the National Government competing with each other in seeking alternately to grant and to deny the already unequivocally reserved authority of the States over their public schools. It is a situation which was emphasized anew by the recent vote of Congress to admit Hawaii to statehood.

Section 5(f) of the Hawaii Act specified that that State's schools "shall forever remain under the exclusive control of said State," a provision which brings to an even dozen the number of States to which Congress has made legislative grants of sole educational jurisdiction since 1889.

The Supreme Court, on the other hand, through its decision of May 17, 1954, and subseqent implementation decrees, has denied the 17 so-

called Southern States the right to administer their public schools as they see fit.

All of which has divided the constitutionally equal States of the Union into three unequal classes.

There are 12 States which have been granted exclusive control over their public schools by Congress.

There are 17 States which have been denied exclusive control over their public schools by the Supreme Court.

And there are 21 States in the middle which do not know where they stand.

The resulting confusion and instability have created an unfavorable climate for education in this country which Congress must act soon to correct if confidence in public education is not to be destroyed.

It is the purpose of the amendment which my colleagues and I have offered to remedy this situation through the simple course of writing into the Constitution an explicit guarantee of the right of the States to perpetual and exclusive control over their public school systems. In that way the authority for State and local control of education would become both the express and the implied supreme law of the land.

Such an amendment would do no more than bestow upon all 50 States the authority to manage their own school affairs which Congress by statute already has conferred upon 12 of them.

The fact that Congress has so acted came as a great suprise to many Americans—including the President of the United States.

During the course of my speech before the Senate on January 27, when I proposed the constitutional amendment now under consideration, I referred to the fact that Congress, in voting last year to admit Alaska as the 49th State, gave that State exclusive and perpetual control over its public schools and colleges.

The New York Times of Thursday, January 29, in printing a transcript of the Chief Executive's news conference of the preceding day, quoted Mr. Eisenhower as stating that such was, to use his words, "a matter that I have not even heard about."

The Times transcript added this further comment from the President:

> I didn't know that there was any difference in the responsibility and authority of the new State of Alaska as compared to other States * * *.

A subsequent check of the admission acts of all other States made at my request by the Legislative Reference Service of the Library of Congress disclosed that 10 other States likewise were granted "exclusive control" over their educational institutions upon the granting of statehood to them.

Such grants of authority were made to the States of North Dakota, South Dakota, Montana, and Washington in 1889; to the States of Idaho and Wyoming in 1890; to the State of Utah in 1894; to the State of Oklahoma in 1906; and to the States of New Mexico and Arizona in 1912.

In each case, Mr. Chairman, the term "exclusive control" was used and, with the one exception of Oklahoma, each such delegation of power was made "forever." In the case of Oklahoma, the further proviso was written into the law assuring that the act would "not be construed to prevent the establishment and maintenance of separate schools for white and colored children."

The 12th such grant of authority was made this year to Hawaii.

With the permission of the subcommittee, Mr. Chairman, I would like to have printed at this juncture of my testimony the language of the admission acts of North Dakota, South Dakota, Montana, Washington, Idaho, Wyoming, Utah, Oklahoma, New Mexico, Arizona, Alaska, and Hawaii relating to State control of education.

Senator KEFAUVER. Without objection the language of the admission acts of these States will be printed into the record.

(The language of the admission acts referred to are as follows:)

North Dakota, South Dakota, Montana, and Washington

SEC. 14. * * * The schools, colleges, and universities provided for in this act shall forever remain under the exclusive control of the said States, respectively, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes shall be used for the support of any sectarian or denominational school, college, or university (Public Law No. 52, 50th Cong., 2d sess., ch. 180, sec. 14; 25 Stat. 676, 680 (1889)).

Idaho

SEC. 8. * * * The schools, colleges, and universities provided for in this act shall forever remain under the exclusive control of the said State, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes shall be used for the support of any sectarian or denominational school, college, or university (51st Cong., 1st sess., ch. 656, sec. 8, 26 Stat. 215, 216 (1890)).

Wyoming

SEC. 8. * * * The schools, colleges, and universities provided for in this act shall forever remain under the exclusive control of the said State, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes shall be used for the support of any sectarian or denominational school, college, or university (51st Cong., 1st sess., ch. 664, sec. 6, 26 Stat. 222, 223 (1890)).

Utah

SEC. 11. The schools, colleges, and university provided for in this act shall forever remain under the exclusive control of said State, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes, or of the income thereof, shall be used for the support of any sectarian or denominational school, college, or university (53d Cong., 2d sess., ch. 138, sec. 17, 28 Stat. 107, 110 (1894)).

Oklahoma

SEC. 8. * * * Such educational institution shall remain under the exclusive control of said State, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes, or the income or rentals thereof, shall be used for the support of any religious or sectarian school, college, or university (59th Cong., 1st sess., ch. 3335; sec. 8, 34 Stat. 267, 273 (1906)).

Section 3 of the same act contained the following provision:

Fifth. That provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of said State and free from sectarian control; and said schools shall always be conducted in English: *Provided*, That nothing herein shall preclude the teaching of other languages in said public schools: *And provided further*, That this shall not be construed to prevent the establishment and maintenance of separate schools for white and colored children.

New Mexico

SEC. 8. That the schools, colleges, and universities provided for in this act shall forever remain under the exclusive control of the said State, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college, or university. (61st Cong., 2d sess., ch. 310, sec. 8, 36 Stat. 557, 563; 573, 714.)

Arizona

SEC. 26. That the schools, colleges, and universities provided for in this act shall forever remain under the exclusive control of the said State, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college, or university (applicable to Arizona) (61st Cong., 2d sess. ch. 310, secs. 8 and 26, 36 Stat. 557, 563, 573, 714).

Alaska

SEC. 6. * * *.

(j) The schools and colleges provided for in this act shall forever remain under the exclusive control of the State, or its governmental subdivisions, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college or university (July 7, 1958 [H.R. 7999] Public Law 85-508, 85th Cong., 2d sess., sec. 6j).

Hawaii

SEC. 5. * * *.

(f) * * * The schools and other educational institutions supported, in whole or in part, out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this act shall be used for the support of any sectarian or denominational school, college, or university (Mar. 12, 1958 (S. 50) Public Law 86-3, 86th Cong. 1st sess., section 5(f)).

Senator TALMADGE. The argument is made that those congressional grants of authority must give way to the decrees of the Supreme Court. That theory is convincingly challenged, however, by the constitutional facts that it is Congress, not the Supreme Court, which was specifically authorized to implement the 14th amendment and that because statehood acts must be ratified by the residents of the Territories concerned they are in effect treaties between the United States and the people of the Territories and, as such, hold status under the Constitution as the supreme law of the land.

The noted and respected syndicated columnist, David Lawrence, dealt with this aspect of the Alaska Statehood Act in his column of September 2, 1958, and I would quote from it as follows:

Senator KEFAUVER. Senator Talmadge, any of these quotations that you do not want to read in full will be printed in full in the record.

Senator TALMADGE. I thank the chairman. However, Mr. Lawrence's argument is so strong that, if the subcommittee has the time, I would like to read it because I think it makes a very telling point.

Senator KEFAUVER. You go right ahead.

Senator TALMADGE (quoting from Mr. Lawrence):

The first part of the above-quoted paragraph (sec. 6(j) of the Alaska Statehood Act) would seem to go contrary to the 1954 decision of the Supreme Court of the United States in the "desegregation" cases, but actually it doesn't. For the Supreme Court in 1954 merely ruled that no State can pass a law that requires segregation in the schools. It turns out, however, that Congress may pass a law permitting a State to run its own school system without interference by the Federal Government. There are lots of things in the Constitution that are prohibited to the States such as control of interstate commerce and the conduct of foreign relations—and on which Congress may legislate at will.

The new law cannot be repealed or amended by Congress alone. In the recent referendum required by Congress, this particular law was approved by the people of Alaska and formally made a part of the State constitution. So, in effect, this law is a treaty between the Federal Government and the State of Alaska.

While perhaps of academic interest at present to the people of Alaska, who have no segregation problems in the public schools, the new law sets a pattern for the rest of the States of the Union where until 4 years ago control of public

schools had always been recognized as a State power. The Supreme Court in 1954 said merely that under the 14th amendment no State may pass a law that denies "equal protection of the laws." When the Congress, however, now vests in a State "exclusive control" of its own public schools, this is in itself the exercise of a permissive or discretionary power. For the 14th amendment specifically delegates to Congress the right to decide what is or is not "appropriate legislation." The Supreme Court, moreover, claims power to enforce the amendment only in a negative way—by ruling that no State may pass certain kinds of laws. The Supreme Court, for instance, has acknowledged it cannot rely on the 14th amendment to deal with the problem of segregation where the Federal Government is in control of a given territory, as for instance, in the District of Columbia.

Thus, when the Supreme Court in 1954 struck down the "segregation" law in the District of Columbia, it relied on the "due process" clause of the fifth amendment but admitted that this was not as strong a support as the "equal protection" clause of the 14th amendment would have been. This can be construed to mean that the Supreme Court cannot justifiably overrule an act of Congress which, for national defense or other reasons, gives the Federal Government complete control over the public school system in a particular area or when the Congress delegates the task to the States to handle under the doctrine of "exclusive control."

Mr. Chairman, I concur wholeheartedly in the conclusion of Mr. Lawrence in his subsequent column of September 3, 1958, that there is—

no more convincing proof of the intent of Congress that the Federal Government should never interfere in the operation of the public schools by the States—than the language used in the "enabling acts" which, respectively, created at least 10 (now 12) States of the Union.

With the permission of the subcommittee, Mr. Chairman, I would like to have those two columns by Mr. Lawrence printed herewith in the record as a portion of my testimony.

Senator KEFAUVER. Without objection, they will be printed.

(The two columns referred to are as follows:)

[From Washington Star, Sept. 2, 1958]

POSSIBLE INTEGRATION SOLUTION—ALASKA LAW'S LAND FUND CLAUSE SEEN AS LOCAL OPTION KEY TO PROBLEM

(By David Lawrence)

Without any general publicity, the Congress of the United States this summer enacted and President Eisenhower signed a law that gives one State of the Union the right "forever" to retain "exclusive control" over its own public schools.

What Congress can give to one State, it can some day give to other States and still stay within the Constitution as interpreted by the Supreme Court. This may eventually provide the way out of the "integration" controversy.

A little-noticed paragraph in the law creating Alaska as the 49th State has just come to light. After providing that 5 percent of the proceeds of the sale of certain public lands shall be paid to the State of Alaska "to be used for the support of the public schools within said State," the new law, approved by the President on July 7, 1958, reads as follows:

"The schools and colleges provided for in this act shall forever remain under the exclusive control of the State, or the governmental subdivisions, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college or university."

The first part of the above-quoted paragraph would seem to go contrary to the 1954 decision of the Supreme Court of the United States in the "desegregation" cases, but actually it doesn't. For the Supreme Court in 1954 merely ruled that no State can pass a law that requires segregation in the schools. It turns out now, however, that Congress may pass a law permitting a State to run its own school system without interference by the Federal Government. There are lots of things in the Constitution that are prohibited to the States such as control

of interstate commerce and the conduct of foreign relations—and on which the Congress may legislate at will.

The new law cannot be repealed or amended by Congress alone. In the recent referendum required by Congress, this particular law was approved by the people of Alaska and formally made part of the State constitution. So, in effect, this law is a treaty between the Federal Government and the State of Alaska.

While perhaps of academic interest at present to the people of Alaska, who have no segregation problems in the public schools, the new law sets a pattern for the rest of the States of the Union where until 4 years ago control of public schools had always been recognized as a State power. The Supreme Court in 1954 said merely that under the 14th amendment no State may pass a law that denies "equal protection of the laws." When the Congress, however, now vests in a State exclusive control of its own public schools, this is in itself the exercise of a permissive or discretionary power. For the 14th amendment specifically delegates to Congress the right to decide what is or is not appropriate legislation. The Supreme Court, moreover, claims power to enforce the amendment only in a negative way—by ruling that no State may pass certain kinds of laws. The Supreme Court, for instance, has acknowledged it cannot rely on the 14th amendment to deal with the problem of segregation where the Federal Government is in control of a given territory, as, for instance, in the District of Columbia.

Thus, when the Supreme Court in 1954 struck down the segregation law in the District of Columbia, it relied on the due process clause of the fifth amendment but admitted that this was not as strong a support as the equal protection clause of the 14th amendment would have been. This can be construed to mean that the Supreme Court cannot justifiably overrule an act of Congress which, for national defense or other reasons gives the Federal Government complete control over the public school system in a particular area or when the Congress delegates the task to the States to handle under the doctrine of exclusive control.

It is interesting to note that the new law creating the 49th State carefully provides that no part of the money from the sale of public lands should be used for the support of "any sectarian or denominational school, college or university." This is significant, for, according to Supreme Court decisions as recently as April 1952, the first amendment to the Constitution is cited repeatedly as forbidding the use of State funds in support of sectarian or denominational schools or colleges.

There was no reason, therefore, to put this particular proviso in the Alaska law except to emphasize that the only exception to exclusive control would be one governed by the first amendment to the Constitution which prohibits the enactment of any law by Congress "respecting an establishment of religion."

Had the last Congress felt it necessary to limit the powers of the State of Alaska by inserting any other reminders of constitutional barriers, it would have done so. This leads to the conclusion that Congress has opened the legal doors to the settlement of the integration-segregation issue by means of local option. This is the very way the prohibition controversy was finally tackled by Congress and the States in 1933 after 13 years of virtual nonenforcement of the antiliquor laws and after public sentiment in many parts of the country had been aroused against the 18th amendment.

[From Washington Star, Sept. 3, 1958]

CONGRESS AND PUBLIC SCHOOLS—LAW CREATING 10 STATES CALLED PROOF OF STAND AGAINST U.S. INTERFERENCE

(By David Lawrence)

No more convincing proof of the intent of Congress that the Federal Government should never interfere with the operation of the public schools by the States is needed than the language used in the enabling acts which, respectively, created at least 10 States of the Union.

Research by this correspondent reveals that the identical words of a brief section in the law passed by Congress in July giving statehood to Alaska, are to be found also in the statutes that gave statehood to New Mexico, Arizona, Idaho, South Dakota, Montana, Washington, Utah, Wyoming, and Oklahoma.

One reason probably why the clause—which says that the public school and colleges shall forever remain under the exclusive control of the State, or its governmental subdivisions—attracted little attention when inserted in the law creating Alaska was that this language was copied from the enabling acts of the other States. The important difference today, however, is that when every one of the States that preceded Alaska into the Union was admitted, there was no question in anybody's mind about the fact that the public schools were forever to remain under the exclusive control of those States.

No decision of the Supreme Court upsetting State control had been handed down prior to 1954. Now, 4 years later, Federal judges, as in Virginia, are actually examining the applications of students seeking admission to public schools and scrutinizing their qualifications to determine whether a school board has discriminated against a Negro applicant. Certainly it was not assumed heretofore that the public schools of any States would ever be subject to control by the Federal judiciary or by the military forces of the Federal Government. Just a year ago, for instance, Federal troops were stationed inside Central High School at Little Rock, Ark., to maintain discipline.

Even the Supreme Court of the United States has become a super school board these days, as testimony about the misbehavior of students and the influence of their parents in the home and the state of public sentiment is being reviewed this week to determine whether there is reason to delay temporarily the entrance of Negro students into Central High School at Little Rock.

Certainly the grant by the Federal Government of authority to at least 10 States to maintain "exclusive control" of their own public schools emphasizes that powers have apparently been delegated to some States which other States are not permitted to enjoy. May the Congress itself discriminate between States? Must it not respect eventually the rights of all States to maintain "exclusive control" of their public schools as a power "reserved" to them under the 10th amendment of the Constitution?

None of the States which enjoys immunity from Federal interference under an "enabling act" needs to pass or invoke any segregation laws now, for to do so might be held to violate the 14th amendment as the Supreme Court has construed it. But if, in the normal course of school operation, pupils are assigned to one school instead of another by county or city school boards, it would be a manifest interference by the Supreme Court or any Federal court to say that the words "exclusive control" do not mean what they say and that this phrase now is amended by the 1954 decision of the Supreme Court. The fact that Congress only 2 months ago still used the phrase "under the exclusive control of the State, or its governmental subdivisions," can be taken to mean that Congress felt the Supreme Court's ruling of 1954 did not apply to acts of Congress confirming the complete power of a State over its own public schools.

Almost all the States that have the immunity clause in their "enabling acts" do not have segregation problems. The only exception is Oklahoma, which has maintained segregated schools in the past and lately has been introducing "integration" in some school districts.

The State of Oklahoma can, of course, today choose to ignore the "exclusive control" clause granted when it was admitted as the 46th State in 1907, or it can test the effectiveness of the pledge given to it by the Federal Government. To make such a test now, it would not be necessary to invoke any State law but simply by the routine operation of a school board, to assign pupils to certain schools in whatever way the local authorities stipulated. Negro applicants could then bring suit and the Supreme Court would have to decide whether a solemn pledge given by the Congress to a sovereign State can be repudiated by the Federal judiciary. If this can be done, then no provision of the "enabling act" of any State is safe from legal attack, and hosts of suits hitherto decided and involving the disposal of property, especially public lands, can be reopened and set aside whenever the whim of the Federal judiciary may so decide.

Plainly, Congress, which recently has been studying whether to amend the "appellate jurisdiction" of the Supreme Court of the United States may find it necessary to take away from the Federal courts the right to pass on the validity of certain sections of the "enabling acts" under which States have been admitted to the Union. The Constitution specifically grants to Congress the power to limit by law the "appellate jurisdiction" of the Federal courts.

Senator TALMADGE. As I have stated on several recent occasions, I do not believe there is any person who is genuinely concerned about

the future of our Nation and the education of all its children who cannot and will not subscribe to the proposition of local control of schools.

The public schools of the United States are local institutions which have been established and are operated and financed by local people on the local level. And all persons willing to view the question dispassionately will admit that to fulfill their role they must be administered on the local level by the school patrons directly concerned.

As one who has been close to this issue and who is familiar with all of its ramifications, I wish to state to the subcommittee that unless some step, such as is proposed in the pending amendment, is taken soon to resolve the growing controversy on a realistic, constitutional basis, the ultimate result of the present sequence of events will be to destroy public education in many areas of the South.

Such an eventuality would be an unparalleled catastrophe which no one would deplore more vigorously than I.

It would be a terrible tragedy from which no one would benefit and in which the children of the South would be the principal losers.

The importance of education hardly can be overstated.

With the exception of seeking the salvation of his immortal soul, man has no greater responsibility than seeing that his young are educated to the fullest extent of their abilities and are equipped spiritually and intellectually to achieve mankind's highest destiny.

The American concept of universal education, more than any other factor, is responsible for the greatness which this Nation has achieved. And it very likely may prove to be the determining factor in the outcome of our present life-or-death struggle with international communism.

This critical juncture in our national life is no time to permit divisive issues to rob the Nation of the minds and talents of a great segment of its youth by closing thhe doors of the public schools in their faces.

To the young people of the South there is little difference between closing schools with court orders and destroying them with bombs because the end result of both actions is the same—to deny them their right to a public education.

The basic question involved is far more fundamental than the mere matter of who attends what school. It goes to the very heart of our concept of constitutional republican government; that is, the right of local people to run their local affairs in accordance with local wishes, conditions, and prevailing attitudes.

The very basis of our form of government is, in the words of the Declaration of Independence, that it derives its "just powers from the consent of the governed." And whenever we in this country, get away from that cornerstone of our freedom, as of that moment we will have ceased to be a nation in which the people govern themselves and will have become a judicial dictatorship instead.

Now, I recognize that on the issue of separation of the races in the schools of the Nation there is a wide divergence of opinion and individual feelings are strong and inflamed on both sides. Many false emotional factors have been injected and those undoubtedly account for the failure of any of the judicial corrective measures to come

before Congress to date to seek to deal with the illegalities of the Supreme Court's ruling in the school cases.

It is most unfortunate that many of those who are loudest in denouncing the South are the same persons who demonstrate more interest in pandering to the prejudices of minority groups for political gain than in seeking the best possible public education for all the young people of America regardless of their color or place of residence.

And let me state in passing, Mr. Chairman, for the benefit of the professional race baiters and the chronic bleeding hearts, that the races are living together in harmony and mutual respect in my State of Georgia. They are solving whatever racial problems Georgia may have on the local level in accordance with local wishes and I am confident those good relations will continue regardless of what the future may bring.

The constitutional and sociological ramifications of the decision of the Supreme Court that separate, but equal, education is violative of the 14th amendment have stirred a continuing controversy which has divided the best minds of the country.

(At this point, Senator Stennis came into the hearing room.)

Senator KEFAUVER. Just a minute, Senator Talmadge. Senator Stennis, we would be glad to have you sit here with us.

Senator STENNIS. I want to hear his testimony, thank you.

Senator TALMADGE. There are those who consider the decision to be the law of the land and who are determined to force its implementation regardless of the results.

There are others, like myself, who consider the decision to be outside the scope of the Constitution and who are dedicated to seeking its reversal by every lawful means.

Therefore, an essential prerequisite to solving the issue without destroying the public schools of the South, is a recognition on the part of all the people of this Nation—East and West as well as North and South—of these two incontrovertible facts of the situation.

First, whether one accepts it or not, the Supreme Court's school decision is an accomplished fact which will remain so until it either is reversed by the Court itself, or is nullified or modified by Congress or the people.

And, second, whether one likes it or not, the overwhelming majority of the people of the South will neither accept nor submit to the forced implementation of that decision and there is no prospect of any change in that position within the foreseeable future.

There is only one realistic, constitutional way by which the public schools of the South can be spared the fate of being crushed between

those two millstones, and that way lies in recognizing that public schools are local institutions which must be operated by local people on the State and local levels if they are to survive.

Such a solution is afforded by the amendment now under consideration by this subcommittee.

It is a solution which is compatible with our American constitutional concepts and which would settle the question for all time to come and serve the best interests of the present and future generations of American youth.

It would forever end the threat of Federal control of education from any quarter.

It would assure the uninterrupted instruction of all the children of the Nation regardless of their color or place of residence.

It would assure that whatever change might take place would be with the consent of the governed and by the constructive process of evolution rather than the destructive process of revolution.

It would preserve the constitutional right of the States and their citizens to run their own affairs.

It would create a basis for unity throughout the Nation at a time when it is vitally important that we of the United States present a united front before our enemies.

The principle of State and local control of public education is well established by both law and precedent.

Our Founding Fathers, as I have noted, recognized that education is a local responsibility by leaving it as one of the areas retained for exclusive State and local control under the terms of the 9th and 10th amendments.

It is a principle which is supported both by the local nature of school financing and by the findings of responsible Federal study groups.

According to the Library of Congress, 93.4 percent of all public school revnue and 96.4 percent of all capital outlay funds for public school facilities are raised on the State and local levels. Those figures compare to 4.6 percent of school revenue and 3.6 percent of capital outlay funds which come from the Federal level.

With the permission of the subcommittee, Mr. Chairman, I should like to have incorporated into the record at this point in my testimony the tables on sources of school revenue and capital outlay provided me by the Library of Congress.

Senator KEFAUVER. Without objection, they will be printed in the record at this point.

(The tables referred to are as follows:)

TABLE 3.—*Revenue and nonrevenue receipts, and balances from previous year, by State: 1955–56*

[Amounts in thousands of dollars]

Region and State	Total amount available (cols. 3+4+15)	Balances from previous year	Revenue receipts (taxes, appropriations, etc.), by source										Total nonrevenue receipts (bonds, loans, etc.)
			Total revenue receipts	Federal		State		Intermediate		Local [1]		Other revenue receipts [2]		
				Amount	Percent of total	Amount	Percent of total	Amount	Percent of total	Amount	Percent of total	Amount	Percent of total	
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)
Continental United States:														
1955–56	14,529,654	2,486,788	9,686,677	441,442	4.6	3,828,886	39.5	173,624	1.8	5,220,435	53.9	22,291	0.2	2,356,189
1953–54	11,825,192	2,134,336	7,866,852	355,237	4.5	2,944,103	37.4	240,733	3.1	4,306,521	54.7	20,258	.3	1,824,004
Percent increase, 1953–54 to 1955–56	22.9	16.5	23.1	24.3	-------	30.1	-------	(3)	-------	21.2	-------	10.0	-------	29.2
Northeast	3,617,573	416,340	2,492,313	63,817	2.6	846,147	34.0	19	(4)	1,580,481	63.4	1,850	.1	708,920
Connecticut	156,705	----------	123,870	6,120	4.9	32,639	26.3	----------	----------	85,111	68.7	----------	----------	32,835
Maine	44,809	1,576	38,076	1,972	5.2	10,316	27.1	----------	----------	25,784	67.7	4	(4)	5,156
Massachusetts	238,170	----------	238,170	8,279	3.5	50,517	21.2	----------	----------	179,219	75.2	155	.1	----------
New Hampshire	38,094	6,176	25,552	1,507	5.9	1,399	5.5	----------	----------	22,596	88.4	50	.2	6,366
New Jersey	534,821	108,643	329,087	8,258	2.5	79,518	24.2	19	(4)	240,749	73.2	544	.2	97,091
New York	1,804,960	228,189	1,083,981	21,340	2.0	386,473	35.7	----------	----------	675,241	62.3	928	.1	492,791
Pennsylvania	726,740	61,927	597,370	13,385	2.2	274,516	46.0	----------	----------	309,469	51.8	----------	----------	67,444
Rhode Island	46,367	8,758	37,609	2,051	5.5	5,983	15.9	----------	----------	29,576	78.6	----------	----------	----------
Vermont	26,907	1,071	18,598	905	4.9	4,787	25.7	----------	----------	12,737	68.5	169	.9	7,238
North Central	4,624,391	968,251	2,777,241	99,910	3.6	859,512	30.9	78,441	2.8	1,733,321	62.4	6,057	.2	878,900
Illinois	817,699	165,405	437,945	15,586	3.6	105,251	24.0	13	(4)	317,095	72.4	----------	----------	214,349
Indiana	297,092	----------	262,837	7,055	2.7	88,001	33.5	739	.3	166,491	63.3	551	.2	34,255
Iowa	308,870	83,552	174,046	4,899	2.8	22,922	13.2	1,802	1.0	141,812	81.5	2,612	1.5	51,271
Kansas	197,391	25,550	143,273	8,791	6.1	33,250	23.2	23,813	16.6	77,418	54.0	----------	----------	28,538
Michigan	874,535	192,024	528,281	13,501	2.6	256,257	48.5	1,809	.3	256,715	48.6	----------	----------	154,230
Minnesota	344,765	66,178	201,203	7,043	3.5	80,227	39.9	8,545	4.2	104,042	51.7	1,347	.7	77,384
Missouri	333,875	94,227	200,045	9,846	4.9	72,017	36.5	13,394	6.7	103,336	51.7	551	.3	39,603
Nebraska	138,583	35,095	69,220	3,485	5.0	4,515	6.5	6,971	10.1	53,948	77.9	302	.4	34,267
North Dakota	63,613	17,618	35,794	1,520	4.2	9,218	25.8	7,658	21.4	17,398	48.6	----------	----------	10,201
Ohio	829,113	185,147	474,057	17,814	3.8	142,398	30.0	54	(4)	313,697	66.2	93	(4)	169,909
South Dakota	71,647	22,521	42,445	2,558	6.0	4,275	10.1	7,067	16.6	28,545	67.3	----------	----------	6,680
Wisconsin	347,209	80,903	208,094	7,813	3.8	40,281	19.4	6,576	3.2	152,824	73.4	600	.3	58,213

South	3,315,966	409,583	2,537,787	174,759	6.9	1,377,693	54.3	21,422	.8	953,068	47.6	10,845	.4	368,626
Alabama	147,750	11,704	132,584	10,036	7.6	97,836	73.8	----------	----------	24,198	18.3	514	.4	3,462
Arkansas	87,068	13,846	63,100	7,038	11.2	26,724	42.4	----------	----------	29,337	46.5	----------	----------	10,123
Delaware	40,198	7,816	25,684	780	3.0	21,490	83.7	----------	----------	3,414	13.3	----------	----------	6,697
Florida	314,383	74,181	201,283	10,615	5.3	107,073	53.2	----------	----------	83,472	41.5	124	.1	38,919
Georgia	187,818	18,450	159,509	12,683	8.0	103,403	64.8	----------	----------	42,854	26.9	569	.4	9,858
Kentucky	112,897	----------	104,375	8,728	8.4	37,462	35.9	----------	----------	57,898	55.5	287	.3	8,522
Louisiana	251,225	43,720	171,005	7,913	4.6	107,742	63.0	----------	----------	53,865	31.5	1,485	.9	36,500
Maryland	225,916	21,952	157,593	13,112	8.3	51,445	32.6	----------	----------	92,483	58.7	554	.4	46,371
Mississippi	95,650	10,153	80,609	6,232	7.7	41,804	51.9	9,805	12.2	22,768	28.2	----------	----------	4,887
North Carolina	262,207	29,476	214,486	13,060	6.1	148,045	69.0	----------	----------	49,834	23.2	3,548	1.7	18,245
Oklahoma	166,850	----------	136,277	10,104	7.4	58,678	43.1	9,987	7.3	57,496	42.2	14	(4)	30,573
South Carolina	160,670	15,377	138,081	6,688	4.8	102,864	74.5	----------	----------	28,523	20.7	6	(4)	7,211
Tennessee	174,552	16,044	139,370	10,028	7.2	81,820	58.7	----------	----------	47,060	33.8	462	.3	19,138
Texas	713,663	98,321	514,915	24,917	4.8	277,498	53.9	1,630	.3	208,760	40.5	2,110	.4	100,427
Virginia	223,298	32,751	167,648	23,180	13.8	58,534	34.9	----------	----------	84,828	50.6	1,105	.7	22,899
West Virginia	110,717	13,077	92,847	4,231	4.6	55,275	59.5	----------	----------	33,274	35.8	66	.1	4,794
District of Columbia	41,133	2,714	38,419	5,415	14.1	----------	----------	----------	----------	33,004	85.9	----------	----------	----------
West	2,971,694	692,615	1,879,336	102,957	5.5	745,534	39.7	73,743	3.9	953,564	50.7	3,539	.2	399,742
Arizona	107,066	23,992	71,992	5,694	7.9	22,257	30.9	7,809	10.8	36,134	50.2	99	.1	11,082
California	1,777,560	416,320	1,096,263	50,729	4.6	450,376	41.1	22,650	2.1	569,930	52.0	2,578	.2	284,977
Colorado	220,676	68,180	109,904	6,535	6.3	20,427	18.6	8,837	8.0	73,521	66.9	214	.2	42,592
Idaho	54,397	8,142	37,405	2,194	5.9	9,574	25.6	5,120	13.7	20,517	54.9	----------	----------	8,850
Montana	82,898	24,963	48,322	2,793	5.8	11,909	24.8	13,387	27.7	20,173	41.7	----------	----------	9,614
Nevada	25,165	8,053	16,292	2,468	15.2	6,705	41.2	----------	----------	7,118	43.7	----------	----------	820
New Mexico	96,507	26,208	64,866	8,256	12.7	42,070	64.9	----------	----------	14,525	22.4	14	(4)	5,433
Oregon	171,767	23,298	135,983	4,855	3.6	35,965	26.4	4,933	3.6	90,229	66.4	----------	----------	12,486
Utah	84,320	17,868	60,673	3,484	5.7	22,941	37.8	----------	----------	34,132	56.3	117	.2	5,779
Washington	306,981	70,338	206,152	14,494	7.0	110,806	53.7	9,459	4.6	71,392	34.6	----------	----------	30,491
Wyoming	44,357	5,254	31,486	1,085	3.4	12,444	39.5	1,548	4.9	15,892	50.5	518	1.6	7,617
Outlying parts of the United States:														
Alaska	13,860	----------	13,860	2,642	19.1	6,838	49.3	----------	----------	4,380	31.6	----------	----------	----------
American Samoa	(5)	----------	(5)	255	----------	----------	----------	----------	----------	(5)	----------	----------	----------	----------
Canal Zone	2,902	----------	2,902	2,902	100.0	----------	----------	----------	----------	----------	----------	----------	----------	----------
Guam	2,238	----------	2,238	----------	----------	----------	----------	----------	----------	2,238	100.0	----------	----------	----------
Hawaii	29,724	191	29,532	3,330	11.3	----------	----------	----------	----------	26,053	88.2	149	.5	1
Puerto Rico	53,637	----------	53,637	9,545	17.8	----------	----------	----------	----------	44,092	82.2	----------	----------	----------
Virgin Islands	1,197	----------	1,197	143	12.0	----------	----------	----------	----------	1,051	87.8	3	.3	----------

[1] When a county operates public schools directly, it is classified as "local"; but when a county serves as an administrative unit between the State and local school districts it is classified as "intermediate."

[2] Includes gifts and also tuition and transportation fees from patrons.

[3] A direct comparison between the 1955–56 data and the 1953–54 data cannot readily be made because of a reclassification of items comprising "intermediate" and "local."

[4] Less than 0.05 percent.

[5] Incomplete; amount of local funds provided by villages not available.

NOTE.—Detail may not add to totals because of rounding.

TABLE 3.—*Total expenditures for public schools, capital outlay, and interest on school debt, for a period of 7 years: 1950–51 to 1956–57*

State	Total expenditures for public schools	Amount of capital outlay by source of funds					Amount for interest on debt
		Total	Local, 79.7 percent	State, 8.8 percent	Federal, 3.6 percent	School building authorities, 7.9 percent	
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Total	$65,131,492,110	$14,972,593,217	$11,939,419,625	$1,311,548,270	$537,739,093	$1,183,886,229	$1,165,194,317
Alabama	783,722,756	87,735,247	52,091,686	21,288,048	14,355,513	0	4,384,699
Arizona	441,786,134	105,783,952	91,899,959	0	13,883,993	0	7,815,440
Arkansas	453,001,130	85,082,169	65,984,375	8,420,324	10,677,470	0	12,216,820
California	7,289,560,019	2,071,911,679	1,522,019,111	465,185,719	84,706,849	0	135,745,032
Colorado	663,775,783	171,341,541	160,490,615	0	10,850,926	0	16,147,526
Connecticut	892,691,000	207,102,000	190,022,697	10,869,366	6,209,937	0	18,979,000
Delaware	184,440,054	62,363,505	22,745,168	39,353,057	265,280	0	2,038,353
Florida	1,181,109,055	293,978,212	238,139,206	42,835,111	13,003,895	0	22,692,888
Georgia	1,162,170,050	268,525,857	101,973,165		25,565,304	140,987,388	8,263,381
Idaho	259,555,022	53,468,427	49,597,684	0	3,870,743	0	4,231,329
Illinois	3,677,960,896	832,263,000	822,101,543	0	10,161,457	0	90,009,112
Indiana	1,621,014,568	258,976,324	166,223,361	8,252,965	5,420,623	79,079,375	13,034,000
Iowa	1,122,970,000	243,367,100	241,649,903	0	1,717,197	0	12,992,600
Kansas	950,568,438	253,533,973	244,337,169	0	9,196,804	0	20,403,600
Kentucky	786,874,000	144,851,796	31,302,996	8,582,880	4,873,921	100,092,000	15,863,950
Louisiana	1,171,992,057	217,534,825	212,974,618	0	4,560,207	0	29,651,113
Maine	252,077,002	27,640,028	21,683,983	22,437	1,840,142	4,093,466	2,203,108
Maryland	1,078,562,000	312,758,000	187,533,396	95,366,389	29,858,215	0	27,819,000
Massachusetts	1,581,047,000	255,637,424	254,440,009	0	1,197,415	0	
Michigan	3,484,082,012	787,915,231	726,665,867	32,619,691	28,629,673	0	50,850,890
Minnesota	1,434,801,770	355,611,000	352,970,687	0	2,640,313	0	31,678,000
Mississippi	449,014,225	53,863,529	39,057,614	10,426,283	4,379,632	0	88,000
Missouri	1,324,214,353	259,246,673	238,390,081	10,677,917	10,178,675	0	13,182,160
Montana	287,338,292	49,347,066	45,684,867	0	3,662,199	0	2,568,374
Nebraska	483,060,245	67,901,688	65,140,766	0	2,760,922	0	6,068,612
Nevada	115,528,662	34,629,041	29,326,523	500,000	4,802,518	0	2,840,229
New Hampshire	172,037,000	31,155,382	30,929,381	0	226,001	0	1,936,000
New Jersey	2,248,387,658	470,134,380	464,648,686	808,050	4,677,644	0	46,833,650
New Mexico	369,110,013	85,770,570	67,795,115	0	17,975,455	0	3,999,190
New York	7,242,438,000	1,789,790,000	1,778,718,000	0	11,072,000	0	201,863,000
North Carolina	1,464,504,000	320,573,776	230,360,973	83,738,803	6,474,000	0	22,570,081
North Dakota	248,063,329	45,255,229	40,421,190	4,548,812	285,227	0	2,498,694
Ohio	3,324,443,100	836,236,333	795,183,924	23,277,553	17,774,856	0	81,208,736
Oklahoma	860,347,849	157,216,936	138,580,487	0	18,636,449	0	12,115,000
Oregon	852,382,082	204,696,967	201,856,539	0	2,840,428	0	15,281,851
Pennsylvania	4,434,691,000	1,121,331,475	259,328,537	0	4,245,938	857,757,000	41,716,622

Rhode Island	202,954,759	22,264,709	20,151,575	0	2,113,134	0	----------
South Carolina	782,078,000	226,947,884	41,563,239	176,593,820	8,790,825	0	12,931,288
South Dakota	273,129,158	35,971,888	34,103,520	0	1,868,368	0	2,539,000
Tennessee	930,662,000	162,174,210	107,494,974	46,725,000	7,954,236	0	5,041,702
Texas	3,220,480,531	616,950,458	578,943,155	0	38,007,303	0	101,014,852
Utah	375,915,489	104,423,672	92,298,538	5,304,265	6,820,869	0	4,243,659
Vermont	135,224,670	20,682,377	15,140,352	5,356,874	185,151	0	1,338,363
Virginia	1,151,667,266	331,823,779	182,913,119	105,974,116	42,936,544	0	14,541,010
Washington	1,287,855,994	367,643,253	260,783,114	75,602,481	31,257,658	0	15,945,159
West Virginia	634,147,000	91,241,000	87,097,000	3,999,000	145,000	0	5,328,000
Wisconsin	1,375,357,000	293,305,744	265,545,274	25,219,309	664,161	1,877,000	12,846,000
Wyoming	182,603,689	48,342,908	47,691,885	0	651,023	0	2,636,444
District of Columbia	230,096,000	26,291,000	23,424,000	(23,424,000)	2,867,000	0	0
Total	610,946,089	74,608,149	8,135,915	29,620,800	36,851,434	0	3,713,104
Alaska	95,143,425	43,427,543	7,019,000	7,922,552	28,485,991	0	2,470,000
American Samoa	1,842,574	33,200	----------	----------	33,200	0	----------
Canal Zone	21,732,870	1,509,587	0	0	1,509,587	0	0
Guam	14,829,000	2,662,000	----------	2,472,000	190,000	0	0
Hawaii	171,104,960	13,831,357	1,116,915	6,174,654	6,539,788	0	1,243,104
Puerto Rico	299,521,330	11,713,602	0	11,620,734	92,868	0	0
Virgin Islands	6,771,930	1,430,860	(1,430,860)	1,430,860	----------	0	----------

Source: U.S. Office of Education. Thermofax copy of table 3 taken from manuscript of "Financing Public School Facilities," unpublished at this date.

Senator TALMADGE. In a report issued June 28, 1955, President Eisenhower's Commission on Intergovernmental Relations declared that the "national interest in education like many other national objectives, is best served by State and local administration and control." The report characterized local control of education as "one of our most prized possessions."

Among the members of that Commission were the Senators from Minnesota (Mr. Humphrey), Nevada (Mr. Bible), Oregon (Mr. Morse), Kansas (Mr. Schoeppel), and Maryland (Mr. Butler).

With the permission of the subcommittee, Mr. Chairman, I would like to submit for inclusion in the record at this juncture in my remarks the pertinent excerpts from chapter 9 of the Commission's report dealing with education.

Senator KEFAUVER. How long is the report?

Senator TALMADGE. I would judge around 4,000 words.

Senator KEFAUVER. I mean the total report?

Senator TALMADGE. It is about 300 printed pages.

Senator KEFAUVER. This is chapter 9 you have here?

Senator TALMADGE. Yes, sir. Chapter 9 of the final report of the Commission on Intergovernmental Relations.

Senator KEFAUVER. I believe it would be better to have this printed in the appendix of the record, unless you want it at this point.

Senator TALMADGE. Unless the chairman has some good reason to the contrary I would like it printed here. I think it is a very strong statement. I picked it out for particular inclusion in my remarks, and I adopt them as my own, and I rely on them. I have no objection, however, to the chairman putting the remainder of the report in another portion of the record of the hearing.

Senator KEFAUVER. Let's print this part then at this place in the record, and we will examine the rest of the report for length and see if we wish to put it in.

Senator TALMADGE. I appreciate the ruling of the chairman. This insertion will not take up too much space—probably four or five printed pages.

Senator KEFAUVER. It will be printed at this point in the record.

(The document referred to is as follows:)

EXCERPTS FROM CHAPTER 9 OF THE FINAL REPORT OF THE COMMISSION ON INTERGOVERNMENTAL RELATIONS

Most Federal activities in support of education have been incidental to other national objectives. Assistance to land-grant colleges, agricultural extension programs, and agricultural research have all been designed to improve agriculture. Aside from these specialized grants-in-aid funds have been provided to institutions of higher education in support of ROTC and other training programs, defense research, and veterans' programs. None of these latter programs, of course, has as its object the support of education in general, and none is administered by the Office of Education. During the 1930's, the emergency public works program, established for the purpose of providing employment, included many school building construction projects. Another program—grants for construction and operation of schools in areas especially affected by Federal activities—is an outgrowth of the impact of large wartime and defense installations on certain communities.

The cash and commodity grants to the States and to private nonprofit schools for school-lunch programs are intended to promote child health, encourage the consumption of farm products, and prevent waste of food surpluses. School-lunch programs are not directly related to the support of education. It should

be noted that this program is administered nationally by the Department of Agriculture.

Notwithstanding the importance of these Federal programs, direct responsibility for general public education has been left with the States. Functions of primary and secondary education are generally carried out by local units. The extent of participation by the State government varies widely from State to State.

The American people can take pride in the accomplishments of State and local governments in the continued extension of educational opportunities. Financial support has on the whole been generously provided and standards have steadily risen, even in the less wealthy States. There is ample reason to regard State and local control of education as one of our most prized traditions. The Commission is not complacent about the problems which confront our educational system as a result of the impending increase in school population and the resultant need for additional classrooms, and the existing shortage of teachers, but it believes that the American people will address themselves vigorously to their responsibilities in this matter.

That the primary responsibility for the support of general public education should continue to rest with the States and local units is not in dispute. But there are disagreements in determining the nature of national responsibility, and in deciding how that responsibility should be discharged.

Since the early years of the Republic, our citizens have insisted upon free public education. In Madison's words, "a popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both." It is beside the point and completely unnecessary to justify a national interest in education solely upon considerations of national defense or population mobility. Although organized as a Federal system, ours is one Nation, and there is an inherent and indisputable national interest in having an educated citizenry; only in this way can national, as well as State and local, self-government be insured.

But there is nothing incompatible between the national interest in an educated citizenry and our tradition of leaving responsibility for general public education to the States. The national interest in education, like many other national objectives, is best served by State and local administration and control. The Commission believes that with certain exceptions, noted later, national action directly related to general public education is best confined to research, advisory, and clearinghouse functions such as those currently performed by the Office of Education.

It remains to apply these general considerations to existing Federal programs and to the present and anticipated shortages in elementary and secondary school facilities.

* * * * * * *

The Commission believes that State and local governments ought to, and can, take care of primary and secondary school needs. Its Study Committee on Federal Responsibility in the Field of Education came to the conclusion that the State and local governments can, if they will, afford adequate educational services. The Committee's report clearly indicates, however, that whether they do or do not will depend largely on the extent to which the State governments support local efforts.

* * * * * * *

The Commission recommends that responsibility for providing general public education continue to rest squarely upon the States and their political subdivisions. The Commission further recommends that the States act vigorously and promptly to discharge this responsibility. The Commission does not recommend a general program of Federal financial assistance to elementary and secondary education, believing that the States have the capacity to meet their educational requirements. However, where, upon a clear factual finding of need and lack of resources, it is demonstrated that one or more States do not have sufficient tax resources to support an adequate school system, the National Government, through some appropriate means, would be justified in assisting such States temporarily in financing the construction of school facilities—exercising particular caution to avoid interference by the National Government in educational processes or programs.

The Commission recognizes fully the paramount importance of education to the national interest. It cannot, however, blind itself to the reality that sup-

port of general public education by the National Government would present a situation quite different from that existing in grant-in-aid programs in other functional areas. There is no need to "stimulate" State and local activity, since education is already the largest of all State and local activities. There is not here, as in some grant-in-aid programs, a tradition of joint National-State responsibility; on the contrary, education has been controlled traditionally by local units of Government, with State aid and supervision. There is no need for Federal leadership in setting minimum standards. There is a strong desire on all sides to avoid Federal setting of standards or conditions or the application of any other form of Federal control or supervision. There is a widespread feeling that any degree of Federal control over education would be dangerous.

If adequate educational opportunities were available only through a program of Federal financial assistance, the decision would be clear. But it does not follow that Federal aid is the way to get good schools. Under any moderate program of aid, the amount going to individual States would not be large enough to count effectively. And Federal aid in an amount sufficient to mitigate the problem significantly could result in such undermining of State and local responsibility as to endanger seriously the kind of educational system that has served us so well.

There are other special conditions. Twelve percent of the school children in the United States are educated in nonpublic schools, many of them in religious schools. The inclusion of these schools in any program of Federal aid would raise difficult legal questions and policy issues. Moreover, the key unit in the public educational system is the school district. If the National Government dealt directly with the Nation's tens of thousands of school districts, it would conflict with State educational responsibility and control. If it dealt only with the States, it could not achieve the objectives sought by Federal grants without imposing important and unwanted conditions.

Therefore, Federal financial assistance to any State should be resorted to only if it becomes clearly evident that such State does not have adequate tax resources to provide adequate physical facilities for elementary and secondary schools. In such cases, Federal financial assistance in the form of loans, loan guarantees, grants-in-aid, or a combination of these devices would be justifiable.

Senator TALMADGE. According to the book, "Two Hundred Years of Agricultural Education in Georgia," by the late Dr. John T. Wheeler, references are made on pages 198 and 199 to similar assertions by two earlier national study groups on education.

The Advisory Committee on Education created by President Hoover in 1929 and known as the Wilbur Committee stated in its report:

> In its relation to the States and their political subdivisions, the Federal Government should * * * recognize that all powers over education are reserved to the States respectively.

And the Advisory Committee on Education, appointed by President Roosevelt in 1936, declared in its publication, "The Federal Government and Education":

> Local management of the schools is a part of the American way of life—one aspect of the preservation of American democracy.

Only recently President Eisenhower was quoted by the Associated Press as asserting at his news conference of February 10th that "the principal and basic responsibility for education must continue to rest with the States."

Virtually all educational authorities agree that school administration as a matter of precedent, preference, and constitutional reservation is a function of State and local governments. That is true even of those who applaud the Supreme Court's school decision and who advocate Federal aid to education.

Let us look at what a few of them have had to say on this subject:

In their book, "American Public Education," published in 1955 by the Ronald Press Co., of New York, Professors of Education Calvin Frieder and Stephen Romine of the University of Colorado wrote:

All levels of government in the United States are concerned with education, but of the three levels usually identified—State, local, and Federal—only the first two have responsibility for the management or administration of education * * *. The foundation stone upon which rests the modern concept of the State educational authority is the 10th amendment of the Constitution. Ratified in 1791, this provides that "the powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people." Since the Constitution makes no mention of education, this article is interpreted as reserving to the States the control of public education. This provision actually only recognized a practice which had been long established, for the colonial legislatures had for decades been exercising more or less central control and supervision of the schools.

Profs. Paul R. Mort and William S. Vincent of Columbia University Teachers College stated the matter as follows in their book, "Introduction to American Education," published in 1954 by McGraw-Hill:

* * * Education was not originally listed as among those functions assigned to the Federal Government, and no amendment of the original document has added education to Federal responsibilities. Education was thus in the original Constitution left to the States or to the people to deal with as they saw fit, and this status has not been changed during the intervening years. Education today is a matter over which each State is sovereign. Each of our 48 States may go its own way, taking as little or as great interest in developing public education as it sees fit, as independent from its neighbors as is one country in Europe or South America from another.

And the National Council of Chief State School officers in its 1950 publication, "Our System of Education," came to this conclusion:

The State is sovereign with respect to its basic responsibility for establishing and administering a program of education adapted to the needs of its citizens and for the necessary coordination of all educational activities within its borders.

Mr. Chairman, in my study of the subject, I have failed to find a single responsibile individual who advocated Federal control of education or the application of force in connection with the Supreme Court's school decisions. And to those irresponsible extremists who do so contend, I would like to say two things:

1. Do not forget the disastrous consequences of the use of Federal bayonets in Little Rock, Ark.; and

2. Remember the abhorrent results we have witnessed in our lifetimes from the attempts by Nazi Germany and Communist Russia to control education at the national level.

To those who would advocate inaction and sit idly and smugly by while public education is destroyed in a large area of our country, I would point out the unspeakable hypocrisy of using children as pawns of political expediency.

I hope, Mr. Chairman, that I never have on my conscience the advocacy of a course of action which, if carried out, conceivably could result in the rearing of a generation of American children in ignorance.

As for myself, Mr. Chairman, I am and always have been a stanch adherent to the principle of local self-government and local self-determination. I regard it as the basic safeguard of our freedom and there

is not an issue in our national life today to which I would not be willing to apply it without reservation.

And I sincerely trust that there is not a Member of the Senate—which under our unique republican form of government is the repository of State sovereignty on the national level—who would hold a contrary view on the subject.

The States of the South—with no disrespect to their sister States of North and South Dakota, Montana, Washington, Idaho, Wyoming, Utah, Oklahoma, New Mexico, Arizona, Alaska, and Hawaii—feel they are equally entitled to exclusive control of their schools and colleges.

As a matter of constitutional principle—as a matter of justice and fairplay—and as a matter of reason and commonsense, southerners believe it is correct that such power should be possessed exclusively by the States. But they believe just as strongly that that power should be possessed by all—not just a favored few.

If it is right for the State of Alaska to have exclusive control over its schools, it is right for the State of Arkansas to have the same power.

If it is constitutional for the State of Oklahoma to have exclusive control over its schools, it is constitutional for the State of Virginia to have the same power.

If it is fair for the new State of Hawaii to have exclusive control over its schools, it is fair for the State of Georgia to have the same power.

The Supreme Court of the United States has sought to establish itself—without benefit of constitutional or legislative authorization—as a supreme board of education, superior to the Constitution, to Congress and to the consent of the people. In the course of less than 5 years, it has so disrupted laws governing education that every school in the Nation now is subject to changing notions of whatever five members happen to constitute a majority of the Court at any given time.

I do not believe, Mr. Chairman, that it is the intent of this Congress or the wish of the people of this Nation that the public schools, which were paid for and are financed on the local level, should be left at the mercy of an irresponsible court which has no knowledge of educational needs or the public interest in fulfilling them.

Of all our public institutions, none are more needful or deserving of stability and continuity than are our schools. It is inconceivable that the younger generation can be educated for responsible citizenship in the future under the conditions which now exist in this country.

In the name of the Constitution, in the name of fairplay and in the name of the children of America, I appeal to this subcommittee and to the Committee on the Judiciary, of which it is a part, to report favorably on this amendment and give to the Senate and to the Congress an opportunity to restore to the people of America their right under the Constitution as free men and women to run their schools on the State and local levels according to the wishes of local people.

Senator KEFAUVER. Thank you very much, Senator Talmadge, for a thorough statement.

Senator TALMADGE. I thank the Chairman and the subcommittee for this opportunity to appear and testify.

If there are any questions, I will be glad to try to answer them. If not, that concludes my testimony.

Senator KEFAUVER. Senator Dodd, do you have any questions?

Senator DODD. Yes.

First, Mr. Chairman, I want to thank you for asking me. I have listened with great interest to the observations of Senator Talmadge. They certainly are very interesting and represent a viewpoint which he has very ably expressed.

I have a few questions which occurred to me during the testimony. They are not new; they have occurred to me previously on this question.

Do you think, Senator Talmadge, that the Supreme Court will reverse itself in the foreseeable future?

Senator TALMADGE. No, sir. I do not anticipate that the present occupants of the Court would do so.

Senator DODD. I don't think so, either.

Moving from there, unless it does reverse itself, can you suggest any way that the Congress or the people of this country can modify or nullify that decision of the Court, except by a constitutional amendment?

Senator TALMADGE. There are two ways, as I see it, in which Congress can act, Senator. One would be to adopt this constitutional amendment. The other would be to act under the constitutional power to remove the jurisdiction of the Federal courts over matters relating to public education.

I have introduced bills in the Congress encompassing both procedures.

Senator DODD. They are essentially the same.

Senator TALMADGE. One would deny jurisdiction, therefore merely requiring an affirmative vote of the Congress and approval of the President. The other, of course, involves the amendatory process.

Senator KEFAUVER. I was just going to ask Senator Talmadge to give us the number of his other proposal.

Senator TALMADGE. It is S. 1593, which presently is pending before the Judiciary Committee. It has its basis in paragraph 2, section 2, article 3 of the Constitution which authorizes the Congress to make exceptions to the appellate jurisdiction of the Federal courts except in those instances where the jurisdiction is specified in the Constitution.

Senator DODD. In any event, are these the only two ways that change can be brought about?

Senator TALMADGE. In my opinion these are the only two ways by which the Congress of the United States can act to clarify the situation.

Senator DODD. Therefore, unless under either of these two suggestions a change is made, we now are faced with the fact that this decision is the law of the land?

Senator TALMADGE. It is true that we are faced with the fact that the Court has ruled and called its decision the law of the land. I do not take the position that a decision of the Supreme Court is the law of the land. The Constitution of the United States states that the Constitution, treaties made under the authority of the United States, and acts of Congress are the supreme law of the land. The Constitution itself designates what the supreme law of the land is, and it does not include Supreme Court decisions in that category.

Senator DODD. This is what has always troubled me. I cannot follow that line of reasoning, and I know you are a very good lawyer.

Senator TALMADGE. I appreciate the Senator's statement, but I was merely quoting the Constitution's definition of the supreme law of the land, and I prefer to accept that authority.

Senator DODD. I do not want to be argumentative. I am trying to make a record here that will be clear, at least, to me.

Senator TALMADGE. The Court has ruled, of course, and its ruling, regardless of whether one accepts it, is an accomplished fact and is binding on the lower Federal courts in this land in similar cases.

Senator DODD. Well, to me that would mean it is the law of the land, and I do not know how you can argue it any other way.

Senator TALMADGE. I would make the distinction by referring to the statement of our distinguished colleague, Senator Ervin, who said if a decision is the law of the land then when a court decides a case, it makes the law of the land; when it modifies a case, it modifies the law of the land; and when it reverses a case, it reverses the law of the land.

I, like Senator Ervin, do not go that far. I prefer to call it the "law of the case," which I recognize is binding on inferior courts in similar matters.

Senator DODD. In any event, it is now clear to me what your view is.

My other question is: What provision of the Constitution is your proposal intended to modify? It is not altogether clear to me from your testimony.

Senator TALMADGE. The immediate result which I would hope this amendment, if submitted and ratified, would accomplish, Senator, would be to restore the operation and control of the public schools to the State and local level. Of course, the matter of such grave urgency and great gravity in the Southern States at the moment is the threat of enforced integration of the schools by the Federal courts and their resulting destruction in many areas.

Senator DODD. I understand that. But expressly what provision or provisions of the Constitution does your amendment propose to modify or nullify?

Senator TALMADGE. It does not propose to modify or nullify any of them. It proposes to restate affirmatively what was universally regarded as the law prior to the *Brown* v. *Board of Education*, supra, decision in 1954; that is, that control of public education rests on the State and local levels.

Of course, it would have the effect of modifying the Supreme Court decision in the case of *Brown* v. *Board of Education*, supra. There may be some other areas in which other rulings might be affected to a degree, but what I want to accomplish through the amendment—and if it doesn't accomplish it, I hope the subcommittee will amend it accordingly—is to vest all control, administrative and otherwise, over the public schools of the 50 States in this Nation in the individual States and their political subdivisions.

Senator DODD. Actually, as a matter of constitutional law, wouldn't it only modify the 14th amendment?

Senator TALMADGE. Actually, any modification would be to the Supreme Court's interpretation of that amendment and, as you know, to its companion interpretation of the fifth amendment.

Senator DODD. Those would be the only two, in any event—the 5th and 14th?

Senator KEFAUVER. Senator Dodd, we have the 14th amendment placed in the record. I think it might be well to place the 5th amendment and also the 10th amendment.

Senator TALMADGE. And the ninth.

Senator KEFAUVER. The 5th, 9th, and 10th amendments will be placed in the record at this point.

(The amendments referred to are as follows:)

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 9

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT 10

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Senator TALMADGE. Mr. Chairman, in inserting the decision of the Supreme Court with the approval of the subcommittee when *Brown* v. *The Board of Education*, supra, was inserted, I would hope the committee would also insert *Gong Lum et al* v. *Rice, et al* (275 U.S. 78) which was handed down in 1927. I believe Chief Justice Taft wrote that opinion which also was a unanimous decision.

Senator KEFAUVER. That will be made a part of the appendix of the record. (See appendix C).

Senator DODD. My question with respect to what provisions of the Constitution it could possibly affect was preliminary to another question.

Senator TALMADGE. I think there may be another interpretation affected, Senator. It is the case of *Slochower* v. *Board of Higher Education of New York* (350 U.S. 551), in which the court held the Board of Education of New York City could not discharge a school teacher suspected of communist leanings. I think it would have the effect of changing that.

What I am seeking to do by this proposed amendment is to vest control of the public schools of Connecticut, Tennessee and every other State in this Union in the people of the State affected.

Senator DODD. Didn't the *Slochower* case turn on another constitutional point? But you think it would affect this, nevertheless?

Senator TALMADGE. I think it would because it involved administrative control of the public school system of New York City.

Senator DODD. Well, in any event, actually what you are seeking here, it seems to me, is to return us to the separate but equal doctrine as expressed by the Supreme Court.

Senator TALMADGE. It might have that effect in some areas; but in others, it would not. Each State would be the determining authority as to the manner in which its schools would be administered.

Senator DODD. As a practical matter, the great resistance to this system has come from those areas where they want separate but equal schools.

Senator TALMADGE. That is true, certainly, in my State.

Senator DODD. There wouldn't be much point in pressing this case if you weren't seeking that, would there?

Senator TALMADGE. To be sure that is true in Georgia, but it also very well may be true in the case of other States. For example, there may be considerable sentiment in the case of New York where the *Slochower* case should have been decided by the people of New York.

Senator DODD. I understand that, but I wish to make this point: The separate but equal doctrine was actually necessitated by the "equal protection" clause of the 14th amendment; and, if your amendment is adopted and modifies it, I think we are faced with an entirely different problem. If the separate but equal doctrine was necessary in order to comply with the equal protection clause of the 14th amendment, wouldn't you agree that we are faced with a different situation?

Your amendment is not going to put us back into the separate but equal status, but it is going to put us back prior to the adoption of the 14th amendment in the first place. It is going to put us back where the States could have any kind of schools they wanted. They might have separate but equal schools. Or they might have no schools at all.

Senator TALMADGE. They can have that now. There is no requirement of any State to have schools.

Senator DODD. Or they might have schools that would be grossly unequal for some students. You wouldn't want to see us back there, would you?

Senator TALMADGE. If the Senator takes the position that public education is a matter of Federal, and not State, control, I think he is right in his premise. I do not take any such position. I think the manner of administration of their respective public schools is a matter for determination by each State.

Senator DODD. My point is, however, that, as I understand the history of this, prior to the adoption of the 14th amendment, there was no possibility of the Supreme Court rendering a separate but equal decision. And if we amend the 14th amendment in the fashion that you have suggested here, we will not only go back to the separate but equal doctrine, but we will go back before it.

Senator TALMADGE. If the Senator will let me answer his question——

Senator DODD. If you will just let me finish it.

Senator TALMADGE. Of course.

Senator DODD. We will then have a situation in this country which I very much doubt that you would support. You might have school systems in some areas that were terribly unfair to some students; and is it your argument that this is all right, if the State wants to do that?

Senator TALMADGE. I would point out to the Senator from Connecticut that *Plessy* v. *Ferguson*, *supra*, was decided in 1896 after the ratification of the 14th amendment.

Senator DODD. Yes.

Senator TALMADGE. And I would point out further to the Senator from Connecticut that *Gong Lum* v. *Rice*, *supra*, was decided in 1927 after the ratification of the 14th amendment.

Furthermore, *Brown* v. *Board of Education*, *supra*, was handed down, as I recall, on May 17, 1954, after the ratification of the 14th amendment of the Constitution of the United States.

Senator DODD. Yes.

Senator TALMADGE. Now, there is a conflict in those decisions by the Supreme Court despite the fact that during that period of time Congress had not changed the law and the wording of the Constitution, in that respect, had not been changed in any way whatsoever. The Supreme Court merely stated that times and conditions had changed and that, "We cannot turn the clock back." Thus, they change the law and, in effect, amended the Constitution by judicial usurpation.

Now, the only way the Supreme Court of the United States can be reversed on a constitutional question is by a constitutional amendment.

Senator DODD. I understand your views, Senator, but my question is, "Isn't it a fact that if, by an amendment, we go back, not only beyond that decision but back beyond the 14th amendment itself, we will have a situation in this country in the administration of schools in some areas where the conditions will be absolutely frightful—and it is not all in the South either.

Senator TALMADGE. I am aware that there are educational problems in all regions and the South has no monopoly on them. In fact, we in the South are very proud of our schools.

Senator DODD. Could I interrupt?

Senator TALMADGE. Yes.

Senator DODD. What would prevent a political subdivision from denying decent school facilities to a child on religious grounds if your amendment were adopted? There would be no control.

Senator TALMADGE. I cannot conceive by any stretch of the imagination that such could result in any State. In the first place, all State constitutions have safeguards against any such eventuality; and, in the second place, I do not think we have savages living anywhere in this Union. We have admitted all the States by established procedures, and I think that they are capable of fair government and standing on their rights.

Senator DODD. Well, the history of civilization has been that these things have happened and that is what brings on judicial decisions and constitutional provisions and I am not willing to say that it would be all right without any control, when history thus far shows otherwise.

Senator TALMADGE. I want to say that I think the people in Washington, D.C., are no more competent to run their public schools, than the people in Arizona or any other State in the Union, and I stand on that.

Senator DODD. All right; those are your views. The last point is not so much a question as an observation.

I notice that you rely rather heavily on the unique position of 10 or 12 States—I have forgotten which ones—but the last one, I think

is Hawaii, which, by legislation as it has been described was given exclusive control over its public schools.

What troubles me about that position is that under the supremacy clause of the Constitution, and under *Marbury* v. *Madison*, 5 U.S. 137, aren't these legislative enactments subject to the same constitutional restraints as all other Federal legislation including the equal protection clause of the 14th amendment?

Senator TALMADGE. The Senator is correct of course, with the exception that they cannot be repealed. I was trying to point out that the intent of the Congress of the United States, as it has been manifested time after time, has been to preserve exclusive control of public education within the respective States.

Senator DODD. I know, but——

Senator TALMADGE. And I also tried to point out that, notwithstanding the intent of the Congress, the Supreme Court, by its decision of May 17, 1954, changed that.

Senator DODD. I know, but I think a lot of people, who might read this record without this colloquy, might believe Alaska and Hawaii somehow have been given a special status and that their acts of admission are not subject to constitutional restraint.

And, if you argue that the admission acts are analogous to treaties, we have held for a long time—over 100 years—in this country that treaties are subject to constitutional restraint. The leading case is *Geofroy* v. *Riggs*, 133 U.S. 258 (1890).

As a matter of fact, two distinguished Senators from your State, Senator Russell and former Senator George, led the fight on the Bricker amendment, pressing this point of restraint on treaties—and that is the situation, is it not, in respect to these laws?

Senator TALMADGE. As I understand it, the only restraint on treaties is the Senate of the United States. I do not believe the Supreme Court of the United States can change them.

Senator DODD. I think they are subject to constitutional restraints; and I think that was the heart of the argument, or much of it, in the Senate in the debate on the Bricker amendment, was it not?

Senator TALMADGE. The Senate can put reservations in treaties but it is not within the power of the Federal courts, as I understand it, to alter, change, or determine the meaning of those treaties.

Senator DODD. Those are all of the questions I had in mind. I am grateful to you, Senator.

Senator TALMADGE. I thank you Senator, and I thank this subcommittee.

Senator KEFAUVER. Senator Stennis, do you have any question you wish to ask?

Senator STENNIS. Mr. Chairman, I planned to be before the subcommittee later. I really came by to hear the Senator from Georgia make his statement. I think he has made a remarkable one and its great strength is, in substance, as a plea, Senator Dodd, for schools——

Senator DODD. Yes, I know.

Senator STENNIS. For a system that will permit effective public schools. I congratulate him.

Senator TALMADGE. I wish to thank my friend.

Senator STENNIS. I will be here tomorrow.

(Senator Stennis left the hearing room.)

Senator KEFAUVER. In *Plessy* v. *Ferguson*, supra (at page 543), I notice that the Court cites the *Slaughter-House* cases (83 U.S. 36) in 1873 as the first ones that discussed the application of the 14th amendment to situations such as are being discussed here today.

Senator Sparkman, we will be glad to hear you now.

STATEMENT OF HON. JOHN SPARKMAN, U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SPARKMAN. Mr. Chairman, thank you; Senator Dodd, thank you.

I am here today as a friend of education.

I am not the first to take up the fight for universal free education in America. Nor will I be the last.

Gentlemen, it is ironic—tragic beyond description—that in this Nation, which has, from its very beginning, placed a higher premium on education than any other nation in history, responsible men and women are at this hour sorely distressed and feel compelled to rally to prevent the destruction of their public schools.

I have no doubt that each of you shares in some measure this feeling of distress stemming from the recent course of events which has resulted in the closing of public schools in various localities of the South.

Learning is the lamp of liberty. We were not introduced to freedom by little minds but by the most learned men in the New World.

Knowing this, is it any wonder that the dedication of our forefathers to the values of education predates the Constitution?

The Members of the Continental Congress, when we were done with the business of winning our freedom, turned to providing for our everlasting enjoyment of it.

They took up the task of implementing and spelling out the principles of Government proclaimed and envisioned by the Declaration of Independence and the Articles of Confederation. They began to lay down the foundation stones of a Republic more grand and mightier than the world had ever known or was to know anywhere else to this day.

May we ask ourselves what importance these early statesmen attached to the training of the intellect of the people of the new Nation? The record shows they put nothing ahead of it. We recall that even before the delegates assembled in Philadelphia in Constitutional Convention, the Continental Congress had enacted the ordinances of 1785 and 1787, providing for a government for the Northwest Territory and for the establishment of governments by the future States that were to grow out of it. The ordinance of 1787 declared:

> Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

The ordinances provided grants of public lands to aid the frontiersmen, the pioneers, the settlers, and the local people of the Territory in establishing schools for their children so that the people of the future States might have the means of financial support for their local schools and educational systems.

My purpose in calling to mind these ordinances is to make clear to everyone, my own consciousness that even before the Constitution or

the Constitutional Convention, our Founding Fathers had already recognized the indispensability of education to free government, had recognized their responsibility in the field of education, had already assumed that responsibility and had begun to discharge it.

During my service in the House of Representatives and in the Senate, I have steadfastly supported and helped to pass measures providing Federal financial aid to the States, local communities, and local institutions. To argue that Federal aid to education is a new concept of this day and generation in America is to ignore the record of history.

Since the enactment of the ordinances of 1785 and 1787, over 165 separate acts have been passed by Congress providing some form of Federal aid for education—to aid the States, aid to State agencies, aid to local communities, aid to local institutions. Not one of these measures was to provide Federal education or federally controlled education, federally dominated education, federally dictated education, or federally interfered with education.

There is a difference, as every member of this subcommittee knows.

Gentlemen, you have before you today Senate Joint Resolution 32. The resolution proposes to amend the Constitution of the United States by adding a new article. The article is brief and simple. I should like to read it. The article states:

> Administrative control of any public school, public educational institution, or public educational system operated by any State or by any political or other subdivision thereof, shall be vested exclusively in such State and subdivision and nothing contained in this Constitution shall be construed to deny to the residents thereof the right to determine for themselves the manner in which any such school, institution, or system is administered by such State and subdivision.

Prior to May 17, 1954, when the Supreme Court overthrew all previous court precedents and arrogated to itself Federal power which was never granted by the people, such a proposal as the one before you would have been denounced by historians as surplusage, by constitutional lawyers and legislators as redundancy, and by the rank and file of Americans as frivolous and naive. Not so today.

On May 17, 1954, the Supreme Court, in the school cases, arrived at a conclusion which none of its predecessor Courts or either of the other two branches of the Government or any agency of the Government had ever arrived at before. The Supreme Court unanimously—all nine members of it—managed somehow to satisfy itself that it could take unto itself Federal power with respect to local schools and school systems never exercised before.

The Supreme Court assigned as the source of this newly discovered power of such acquisitive character, the Constitution of the United States, as amplified and implemented by the equal protection of the laws section of the 14th amendment, and as assessed and applied by the Court in accordance with certain theories recently advanced by certain groups of psychologists and sociologists.

Since I am neither a psychologist nor a sociologist, I will not presume to myself competence to discuss the psychological and sociological theories which seem to have impressed the Court so much. With all respect to psychologists and sociologists, I do not think that psychological and sociological theories bore any germaneness whatever to the question that was before the Court. I think the only question before the Court was one of constitutional law, not the application of psychological or sociological theories. I think further that

the proper place for the Court to have looked for the answer to that constitutional law question was the Constitution itself, and, of course, the amendments to the Constitution and, for clarification purposes, to the other great foundation documents of our Government and the debates which preceded or attended their adoption. Surely, there could be no need to look elsewhere. However important theories of psychologists or sociologists may be, we do not forget that ours is first a government of laws.

As a lawyer and legislator of quite some long experience, and as a student of the Constitution and of American history and government, I feel qualified to speak with some degree of intelligence on constitutional law.

Moreover, I have recently made the most painstaking and exhaustive review and examination of every charter of rights and of every constitutional document since our country began and the debates on them.

Let me state, with all the earnestness at my command, that I do not find any documentary support whatever for the Court's position. The evidence is all the other way.

That statement is, of course, a conclusion which I have drawn from the record. But let me place the record before you that you may reach your own conclusions. The record shows:

(1) That Thomas Jefferson, principal architect of the Declaration of Independence, father of the concept of universal free education in this country, author in Virginia of the bill for the general diffusion of knowledge, and mighty contributor to the Articles of Confederation and the Constitution, believed that public education should be under control of the States and local authorities and was opposed to any Federal control of education;

(2) That James Madison, the principal architect of the Constitution, was in perfect agreement with Thomas Jefferson, his closest friend, that public education should be under State and local control and that the Federal Government should exercise no control whatever over education outside the Federal city which was the seat of the Federal Government;

(3) That the Declaration of Independence proclaimed and ordained to the individual States every natural attribute of sovereignty;

(4) That in the Articles of Confederation, the word "education" does not appear; that the Articles of Confederation contained no reference whatsoever to education;

(5) That the Constitution of the United States is utterly and completely silent on the subject of education; that the word "education" does not appear in the entire document; that the Constitution contains no reference whatever to education, direct or indirect;

(6) That education was mentioned but three times during the entire course of debates in the Constitutional Convention and that each of the three references to education was clearly and specifically related to educational institutions in the Federal city, the seat of the Federal Government, where it was agreed that Congress would be granted exclusive legislative authority.

I wish to pause here to remind you that the Supreme Court in its May 17, 1954, decision in the school cases cited the 14th amendment as a source of the power which the Court assumed in the cases.

Now let me continue with the documentation of the development of constitutional government in this country, including the 14th amendment. The record shows:

(7) That the word "education" does not appear in the 14th amendment; that in the 14th amendment there is no reference whatsoever to education or authority with respect to it;

(8) That in all the debates in the House and Senate on House Joint Resolution 127 of the 39th Congress, being the resolution which authorized the submission of the 14th amendment, I find only five references to education; that each of these references was specifically related to educational qualifications of citizens apropos of franchise and representation in Congress; that not one of the references had any application whatever to schools or anything remotely connected with administration and control of schools;

(9) That adoption of the 14th amendment in 1868 did not effect a change in the attitude of Congress with respect to schools, even in the District of Columbia over which the Congress held exclusive undisputed jurisdiction; that separate schools for the separate races were being operated in the District of Columbia before the 14th amendment was adopted; that after the adoption of the 14th amendment, that very Congress that approved it, voted continued support to segregated schools in the District; that subsequent Congresses not only did nothing to abolish segregated schools in the District of Columbia or anywhere else, but continued without interruption, through legislation and appropriations, to make further provision for and to implement the system of segregated schools in the District of Columbia for the next 86 years, down to May 17, 1954, the date of the Supreme Court's decision in the school cases;

(10) That Congress has never, from the First Congress down to the present (and including the 86th Cong., 1st sess.) passed one single act to abolish separate schools anywhere or to interfere in any way with the operation of public schools in any State;

(11) That on the other hand, Congress has, since the adoption of the 14th amendment, passed act after act providing aid to the States for education, expressly upholding, reaffirming, and proclaiming in those acts the right of the States to control their schools and expressly forbidding the Federal Government, in the administration of such acts, to exercise any interference or control whatever over local schools;

(12) That in committee reports accompanying the foregoing acts and in the debates upon them, Congress has recorded and rerecorded its consciousness that the funds provided by the acts would, in those States maintaining separate schools for the separate races, be commingled with States and local funds provided for the maintenance of the separate schools and be used along with such States and local funds;

(13) That in the famed Morrill Act of 1896, which made provision for the further endowment of the land-grant colleges which had been established or endowed in every State under the original Morrill Act of 1862, Congress went even further and specifically provided for the establishment or maintenance, or both, of land-grant colleges for Negroes in States maintaining separate schools for the separate races;

(14) That the present session of this 86th Congress, in March of this year, enacted Senate bill No. 50 to provide for the admission of

the State of Hawaii into the Union; that Senate bill No. 50 (Public Law 86-3) approved March 18, 1959, almost 5 years after the Supreme Court decision of May 17, 1954, contains the following provision:

> The schools and other educational institutions supported, in whole or in part, out of such public trust (that is from public lands and proceeds thereof granted Hawaii) shall forever remain under the exclusive control of said State;

(15) That the Alaskan Statehood Act enacted last year likewise provided for exclusive local control of schools;

(16) That exclusive local control of schools is similarly provided and guaranteed in the enabling acts of at least 10 additional States (all the State enabling acts I have thus far been able to examine). These States are: North Dakota, New Mexico, Arizona, Idaho, South Dakota, Montana, Washington, Utah, Wyoming, and Oklahoma;

(17) That the U.S. Office of Education, the principal arm of the executive branch of the Federal Government having concern with education, has consistently disclaimed any right whatever to interfere in the historic exclusive jurisdiction of the States over public schools;

(18) That the present U.S. Commissioner of Education, Dr. Lawrence G. Derthick, in a handbook of his office, published this year, declared:

> The Constitution of the United States leaves authority to organize, administer, and control the schools to the State governments, which have delegated authority to local communities.

This, gentlemen, is the record—complete, clear, and unequivocal. If there be no other virtue in it—and I believe it has great virtue—the record can at least claim consistency.

It is on the basis of this record that I urge you to report favorably the Talmadge amendment, of which I am a sponsor, so that the control of schools will be returned to the States, as the Constitution intended; so that the will of Congress, as expressed through these many years of the Nation's existence, may be upheld; and so that the threat to public education will be removed.

At least we have the responsibility to permit the people of the several States to decide for themselves whether they wish to have control of their schools.

Senator KEFAUVER. Senator Sparkman, you apparently have given this matter a great deal of study and consideration, and we are glad to have this statement of your views.

Senator SPARKMAN. Thank you, Mr. Chairman.

May I interpolate just this statement in connection with the question that Senator Dodd put to Senator Talmadge with reference to the possibility of having terrible school conditions in one area.

My argument is—and, as I understand it, Senator Talmadge's also, and I am sure that of a great many others who will appear before this subcommittee—that under the Constitution and under the laws of Congress from the establishment of our Government down to the present time with only that one interruption of the Supreme Court decision of May 17, 1954, it was the intention that the individual States would have control over education. And I do not believe that Senator Dodd would have us assume that the conscience of the National Government is greater or better or stronger than the consciences of each of those State governments and of the people who make up those respective States.

I certainly think that the States can be relied upon to establish, maintain, and operate, to the best of their ability, as they have done in the past, an institution to render essential aid and assistance to their most priceless possession, the children, and the families of those particular States.

I cannot believe that such a fear could be justified.

Senator DODD. Mr. Chairman, could I ask a question?

Senator KEFAUVER. Senator Dodd.

Senator DODD. Senator Sparkman, I appreciate your views on the question that I asked Senator Talmadge.

I also listened with great interest to your statement, as I do to anything you say, sir.

Maybe you can help me out. I have another difficulty which did not occur to me when I was questioning Senator Talmadge, or, if it did, I do not think that I expressed it to Senator Talmadge.

It has been argued here today that, in the 1954 decision, the Supreme Court usurped the powers of Congress or the powers of the States through its decision.

If you argue that there was a usurpation of power in 1954 when the Court abandoned the doctrine of separate but equal, how do you get around the point that there was a similar usurpation of power when the Court said in 1896 that separate but equal was all right?

Senator SPARKMAN. The Supreme Court was interpreting when that decision was handed down—I have read the decision in the past; I have not recently—but the Supreme Court was interpreting the equal rights provision of the 14th amendment. It was interpreting that amendment and it said that the maintenance of equal and separate schools did not violate that rule.

Senator DODD. I know, but what plagues me as a lawyer is that separate but equal was all right, apparently in 1896; and now time has gone by from 1896 to 1954, and the same Court interpreting the same provision of the Constitution says, "Well, now, we think that is not good enough."

My point is this: if there is a usurpation of power in 1954, why wasn't there one in 1896 in the first decision?

Senator SPARKMAN. I have never studied the decision with that in mind.

I would adhere to my basic statement, that the Supreme Court, the Federal Government, have no control over the conduct of schools except by law throughout the respective States. And—well, I will rest there.

Senator DODD. I did not mean to make an argument of it, but I think you see my point.

Senator SPARKMAN. Yes, I see your point.

Senator DODD. As a lawyer.

Senator SPARKMAN. Of course, in the case of the 1954 decision, as I recall it, the Supreme Court did not rely upon former decisions of its own Court.

It did not take the position, as I recall, of simply overruling that previous decision and just saying, in other words, that the Court was wrong, but they tried to sustain their decision upon the advancement of certain sociological and psychological and philosophical theories that I think carried them far afield of the Constitution.

I think it is the job of the Supreme Court to interpret the Constitution and not to try to say what the Constitution should have had in it and did not have, or what laws Congress should have passed and did not pass.

Senator DODD. Senator, would you care to tell me what you think of the point I raised with Senator Talmadge about the admission of Alaska and Hawaii and 10 other States?

Senator SPARKMAN. I do not question the statement that the Senator from Connecticut made. As a matter of fact, I believe the most recent pronouncement on that was probably in the Texas oil case in which there was a treaty. I think perhaps there was a more specific case than these would be because there was a treaty between two independent powers.

Senator DODD. That is right.

Senator SPARKMAN. I must say the Court's ruling came as somewhat of a shock to me. I felt that they had gone too far in that ruling; but, nevertheless, based on these previous decisions that had been made, the Supreme Court ruled that after a State came into the Union it stood on the same basis as any other State. I think there is a long line of decisions to that effect.

Senator DODD. There is a long line of decisions also to the effect that treaties are subject to constitutional restraint.

Senator SPARKMAN. I am of the opinion that perhaps the use of words there may not be quite appropriate. I would say that treaties are subject to court interpretation.

Senator DODD. That is right.

Senator SPARKMAN. But after the governments have agreed to a treaty and the Senate of the United States has ratified the treaty, it becomes fixed as far as the terms that are written into it, and the power of the Supreme Court is to interpret those terms just as it does any other provision of the Constitution. The treaty becomes a part of the Constitution, of the supreme law of the land.

Senator DODD. Yes, and subject to constant——

Senator SPARKMAN. Subject to interpretation.

Senator DODD. Well, we are using different words.

Senator SPARKMAN. I prefer to use the word "interpretation."

Senator DODD. I won't quibble about the language. I think we both understand each other. I am grateful to you for clearing that up.

Senator SPARKMAN. Thank you very much.

Senator KEFAUVER. Do you have any questions, Counsel?

Mr. FENSTERWALD. I have no questions, thank you, Mr. Chairman.

Senator SPARKMAN. May I go back to one thing I wanted to add about these provisions written into these State charters?

While it is true that it does not give, under this long line of decisions, anything to those States that is not given to any other States, as I understand, Senator Talmadge did not advance the argument it did. As a matter of fact he agreed with you it did not; but he used it for a purpose which I think is highly relevant, and that is that it shows the intent of Congress right up to this date, or up to March of this year, when it wrote that language specifically into the Hawaiian Statehood Act.

I believe Senator Talmadge made it plain that was his purpose in bringing it out and not to contend that the new State gets a lasting benefit or advantage over some older State.

Senator DODD. Do we have time for one more question, Mr. Chairman?

Senator KEFAUVER. Yes, indeed, Senator Dodd.

Senator DODD. And I do this only because I want the record as clear as we can make it; and I know you do, too.

On the question of a Supreme Court decision being or not being the law of the land, I feel that it is. And I think, until it is reversed or amended, it must be so considered or we will have absolute chaos. We will not have a system of law in this country. Do you agree with me?

Senator SPARKMAN. I think the proper attitude is this: That it is binding only on the Federal court; the Supreme Court itself has said that it is not the law of the land, that it is—I believe it said that it is the present Court's decision as to what the law is at the present time.

Senator DODD. Well, all right.

Senator SPARKMAN. Some such words as that. I did not attempt to quote them exactly, but something like that; but the Supreme Court itself is the authority for the statement that the Supreme Court decision is not the law of the land.

Senator DODD. They suggested that they are not deciding for countless future generations, and I suppose every reasonable person could agree on that.

Senator SPARKMAN. That might very well be. They did use the exact language that a decision of this Court is not a law of the land.

Senator DODD. Let me ask you this, Senator. If I, as a lawyer, represent a client in a lawsuit and I win in the lower court and I am reversed in the Court of Appeals, and I am reversed in the Supreme Court, do you think that I am obligated to tell my client "This is the law; you have to obey it"?

Senator SPARKMAN. After the highest court has ruled upon a proposition that you have lost, you are certainly going to have to abide by it, whether you believe it is right or not.

Senator DODD. That is my point.

Senator SPARKMAN. But the thing about it is that the Supreme Court has ruled as it affects your case, as it affects your particular case. Now, your neighbor the very next day may start a separate case.

Senator DODD. I see.

Senator SPARKMAN. With practically the same treatment and take the same course and come out with a separate decision, and, therefore, it does not become fixed.

And even aside from that, this Government is a government of three coordinate branches: The executive to enforce the laws, the legislative to enact the laws, the judiciary to interpret the laws; and the judiciary is supposed to interpret the law within the framework of the Constitution and the treaties that are made, and that is its jurisdiction, and even though it may overstep that jurisdiction and decide some decision that would bind you as an individual who cared to face up, that does not mean it is right and it is going to stand everlastingly.

Senator DODD. I did not suggest that, but I would say that in an orderly society we must obey the Court's orders as they come down. That is the only point I make.

Senator SPARKMAN. As far as it affects the individual.

Senator DODD. One individual or millions.

Senator SPARKMAN. Yes.

Senator KEFAUVER. I think Senator Dodd raised a very important question, and I think the record is clear on it, but I am not absolutely certain that it is. So I would like to go over it again with you, Senator Sparkman.

You are a very able lawyer. The chronology seems to be that the 14th amendment was adopted in 1868. Then, the first cases that applied the 14th amendment to a question of the type of facilities the citizens should have seems to have been the *Slaughter-House* cases in 1873. These cases were cited in *Plessy* v. *Ferguson*, supra, which was decided in 1896.

The *Plessy* v. *Ferguson* decision held, in effect, that the 14th amendment was satisfied by separate but equal facilities; in that particular case it was a question of transportation facilities.

Then, later, in various decisions following *Plessy* v. *Ferguson*, the separate but equal doctrine was applied to public schools. Then Senator Talmadge referred to the case of *Gong Lum* v. *Rice*, supra, in 1927.

Senator SPARKMAN. That case was in 1927, when Chief Justice Taft wrote the decision with a unanimous Court behind him.

Senator KEFAUVER. Then, later on, of course, in 1954, we have the *Brown* case.

When I first read the amendment proposed by Senator Talmadge, I thought it would take the situation back to *Plessy* v. *Ferguson* and the doctrine of separate but equal facilities; but, apparently, as I understood your answer, if this proposed amendment is passed, there would no longer be a requirement of separate but equal facilities.

Senator SPARKMAN. Mr. Chairman, I am not prepared to pass on that. As I said a while ago, in the *Plessy* v. *Ferguson* case they were dealing with transportation, were they not?

Senator KEFAUVER. Yes.

Senator SPARKMAN. And in that case there was no question about the Federal Government having jurisdiction over interstate commerce.

The point that I make is that education is not mentioned anywhere in any of the documents—the Articles of Confederation, the Constitution itself, or any one of the 22 amendments. And in the course of the debates in the Constitutional Convention the subject of education came up only three times, and in every instance it related to schools in the Federal City.

By the way, Mr. Chairman, I think it is interesting to note that even there, when it was proposed that a national university, a national school, be established in the Federal city, the people apparently were so careful to keep the Federal Government completely away from the field of education that they voted that down, even though the presiding officer had ruled that it would be in order to consider a Federal proposal for a Federal school in the Federal city. So the record all the way down has been that the Federal Government did not belong in the schools, in the field of education.

My answer to that question is this: That, of course, I believe had the Constitution been correctly interpreted, this amendment would not have been a necessity. But the Supreme Court decision is there and, as Senator Talmadge pointed out, there are only two ways it can be corrected.

I think the method that is offered here is the best way, because it would have to be voted upon favorably by a three-quarter majority of all of the States in order for it to become a part of the Constitution; and when it did become a part of the Constitution, it would be clearly written in.

I think it would state only what is already intended in the Constitution, but what has been misinterpreted by the Supreme Court, necessitating some such action as this.

I want to stress this additional point, too: I think it is well known to the gentlemen of this subcommittee that down in our section of the country we have not been able to maintain as high educational standards as some of the wealthier parts of the country. But I believe you will find it is true that in every single one of those States a greater effort has been made than in other sections of the country and that a greater part of the wealth of the people goes into education than anywhere else.

By the way, Mr. Chairman, I think this is a rather interesting point I can make about my section. My State——

Senator KEFAUVER. Are you making the point that a greater percentage of the per capita income goes into education?

Senator SPARKMAN. Yes. My State of Alabama, I think, gives a greater proportion of the educational money to Negro schools than it does to white schools.

When I say "proportion" I say that based on the children, the school-children.

Actually, the average pay to the Negro schoolteachers of my State is higher than that of the white teachers, not because there is any discrimination in favor of that teacher, but, for many, many years, dating away back, we have had a standard program, and I believe you will find it is general throughout the South. Governor Vandiver is coming here from the State of Georgia and I am sure he could give you some interesting statistics on that State, and that is true in these States generally.

We have long had a program in my State that gives to every child in that State the same number of school days. They have made appropriations for that, and likewise, it has provided that every teacher would be paid on the same basis—training, experience, length of service—and based on that, the statistics in my State actually show that the average pay for the Negro teacher is higher than for the white teacher.

Senator KEFAUVER. Senator Dodd, is this matter clear to you? Do you think the record is clear as to just what is intended here, or do you have any questions you wish to ask about it?

Senator DODD. I do not want to characterize the testimony of two distinguished colleagues as unclear, because I know that their testimony is not. However, it is not possible for me to understand anyone who says to me that the Brown decision is not the law of the land. I cannot comprehend those who argue that the Supreme Court decision of 1954 was a usurpation of power and who say with equal fervor that the decision of 1896 was not.

It is beyond my power of comprehension.

Senator SPARKMAN. Well, Senator Dodd, let me call your attention to the fact that the decision of 1896 related to interstate commerce.

Senator DODD. I know that, but the legal question is the same.

Senator SPARKMAN. And the Constitution specifically provides the Federal Government should have control over that.

Senator DODD. I know that, but out of that decision came the separate but equal doctrine which was applied across the board. Philosophically, we are talking about a single point of law. We are dealing with the same question. While facts may differ—we always draw our legal principles from different sets of fact—it is not a real difference; it is a distinction, but not a real difference.

I do not mean to presume or to create an argument here; I know that the South has spent a lot of money on its schools and they have some wonderful schools; but what would you say to the proposition that, if they did not have to duplicate everything, they could get much more?

Senator SPARKMAN. I think that is a fallacy that has been badly overplayed because the population is heavy enough to justify it.

Senator DODD. Thank you, Senator.

Senator SPARKMAN. Just by the number of buildings we have, without needless duplications.

Thank you very much.

Senator KEFAUVER. Thank you, Senator Sparkman.

The subcommittee will stand in recess until 2 o'clock.

(Thereupon, the hearing was recessed at 12:05 p.m. to reconvene at 2 p.m. on the same day.)

AFTERNOON SESSION

Present: Senators Kefauver (presiding) and Dodd.

Senator KEFAUVER. The subcommittee will come to order.

Our first witness this afternoon is the Honorable Ernest Vandiver, the Governor of the great State of Georgia.

We are honored and flattered, Governor Vandiver, to have you appear before this subcommittee. Thank you very much for doing so.

STATEMENT OF HON. ERNEST VANDIVER, GOVERNOR OF GEORGIA

Governor VANDIVER. Thank you so much, Mr. Chairman.

Certainly it is with a deep sense of personal gratitude that I express my thanks to you for affording me the privilege of appearing here today in support of Senator Herman Talmadge's proposed constitutional amendment to restore complete administrative authority over public education to the several States.

I speak to you in a spirit of complete humility knowing of your exemplary career in public service, your devotion to your country and your advocacy of constitutional processes.

For the record here, I will restate the wordage of Senator Talmadge' proposal:

> Administrative control of any public school, public educational institution, or public educational system operated by any State or by any political subdivision thereof, shall be vested exclusively in such State and subdivision and nothing contained in this Constitution shall be construed to deny to the residents thereof the right to determine for themselves the manner in which such school, institution, or system is administered by such State and subdivision.

Mr. Chairman, Senator Talmadge's proposed amendment is in the best American tradition. It is consistent with the principles of fair-

minded men everywhere, North and South, East and West. It is something that all can subscribe to in good conscience, for in the last analysis, it provides simply for local self-government, home rule, so to speak, by consent of the governed.

As Governor of Senator Talmadge's home State, I am honored to add my voice and that of the overwhelming masses of our people, both white and colored, to those of other responsible leaders and groups over the Nation, backing his positive approach to the resolution of this issue, an issue which you and I know, undoubtedly, threatens the safety and security of our country.

Certainly we feel Senator Talmadge deserves the plaudits of every American for his leadership, for his brilliance and for his patriotism.

The people of Georgia feel that during his short span of service in the Senate he has demonstrated qualities of statesmanship which would do credit to Henry Clay and Daniel Webster.

We admire him, respect him, and are proud of his accomplishments.

Let me make it clear to you gentlemen at the outset of my remarks to you that the Talmadge proposal is not a segregation or integration measure per se. It seeks neither, as such. But it would leave each State free to make its own decision.

It is a matter of significance that the newspapers throughout the State of Georgia, both large and small, have given their editorial support to this amendment. The general consensus of their comments has been that it casts aside the purely negative approach and seeks a positive way out of the school dilemma.

Adoption of the proposal here under consideration would restore to the several States their traditional and long-established responsibility over the administration of publicly supported educational institutions. It would put a stop forever to the crippling, divisive struggle between State and Federal authority in this field.

That is what the people of Georgia seek.

They are a law-abiding people. They are a patriotic people. They are a people who love their State and Nation. They are a people who deplore strongly any division in our country.

They are a people who are prepared to give their best thoughts and energies toward finding some mutually satisfactory rallying point around which Americans of all faiths and persuasions and good will can gather to restore harmony and accord to the people of this Nation; thereby, transforming once again our land and our people into one vast, unified force ready to fend off on a moment's notice any and all threats which the evil menace of world communism may hurl against us.

It is time for every American in every section of the country to ask if our Nation can long afford the luxury of internal unrest and tyranny spawned in the troubled field of racial relationships.

The people of Georgia are getting along well together; and I am sure that, free of outside pressures and interference, we could solve our problems to the benefit and acceptance of all. But, unfortunately, we are caught up in the floodtide loosed by the Supreme Court of the United States which threatens to engulf and destroy harmonious conditions which have been built up over the years.

In its *Brown* v. *Board of Education* decision in 1954, the Supreme Court actually amended the Constitution because it ruled in that case

that the "seperate but equal" doctrine which the same Court established as constitutional in 1896 was unconstitutional in 1954, though not a line had been added or subtracted from the 14th amendment, which both decisions construed.

Neither has Congress sought to exercise the power granted in the amendment "* * * to enforce, by appropriate legislation, the provisions of this article" so as to prevent the States of the Union from operating their public schools and administering them in a manner consistent with the needs and conditions of the community and the patrons to be served.

I have prepared a memorandum dealing with the 14th amendment to the United States Constitution, its adoption and application; and in this memorandum I have set forth a number of precedents where the Constitution of the United States has been changed through the amendment process—the only way it can be changed constitutionally. I ask consent of the chairman and members of the committee that this memorandum, marked "Exhibit A" be printed in the record at this juncture in my remarks.

Senator KEFAUVER. Would you rather have it printed at this point or following your remarks?

Governor VANDIVER. I would prefer that it be printed at this point, if the Chair has no objection.

Senator KEFAUVER. That is all right.

(The document referred to follows:)

EXHIBIT A

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

These phrases are, of course, a part of the first section of the 14th amendment declared on July 21, 1868, to have been ratified.

The fifth section of the same amendment provides:

"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Over 90 years have elapsed since this amendment became a part of the Constitution. Never, in all those years, has the Congress enacted legislation construing this amendment so as to prevent the States of the Union from operating their public schools, segregated as to races.

Very soon after the adoption of the amendment it was construed by various State courts and Federal trial courts. Uniformly, these constructions were that, despite the 14th amendment, the States of the Union had the constitutional right to segregate the races in their public schools. These constructions became a part of the fabric of American constitutional law.

Thirty years after the adoption of the 14th amendment they were applied by the Supreme Court of the United States, and the separate but equal doctrine established.

Thirty years later—60 years after the adoption of the amendment—Chief Justice William Howard Taft for a unanimous Court said that the 14th amendment did not forbid race separation.

He reiterated what the Court had said 30 years before:

"The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."

The Court was alluding to the States of Ohio, Indiana, California, and New York.

"The decision is within the discretion of the State in regulating its public schools, and does not conflict with the 14th amendment."

That was the solemn pronouncement of the law of the land made by Chief Justice William Howard Taft, for himself, and Associate Justices Oliver Wendell Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Sanford, and Stone on November 21, 1927.

Almost another 30 years elapsed. The States of the South, emerging from the war of the sixties, and the ravages of reconstruction, peopled by another generation of those as sturdy as their forefathers—and as courageous, and as independent—built up their States, their industries, their colleges, and their schools. Just as their forefathers, prior to 1861, had relied on the Constitution of the United States to protect their property and institutions, the people of the Southern States relied on these unanimous judicial constructions of the Constitution. But on May 17, 1954, nine men substituted their beliefs for the law of the land.

They had thought that if any doctrine of American constitutional law had been established as the law of the land, the "separate but equal doctrine" had.

Now, they seek to have those established doctrines of American constitutional law reestablished.

They seek so to do in the time-honored American way.

They seek so to do in the manner which has been followed in the United States of America since there has been a Federal Government.

They seek so to do by an amendment to the Constitution of the United States.

There are fundamental precedents for this.

Early in the history of the Republic, just 4 years after the Federal Government began to function, the Supreme Court of the United States held that a State could be sued by a citizen of another State for an alleged indebtedness.

Instantly the States of the Union objected.

The contract which they had signed, the Constitution of the United States, intended no such thing.

So, they proceeded to amend that contract.

A few months after the decision of the Supreme Court, an amendment nullifying that decision in *Chisholm* v. *Georgia* was proposed by the Congress. Four years later it was declared ratified, and the Constitution made to read:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign state."

Another instance is that of slavery.

At least three times in the Constitution of the United States, slavery was recognized as a legal institution.

Slaves were property.

As property, they could not legally be taken from their owners except by due process of law.

There was a distinct provision in the original Constitution of the United States that an escaping slave must be delivered up to his master.

The so-called fugitive slave laws were enacted by Congress by virtue of that express constitutional provision.

Those laws were sustained by the Supreme Court of the United States.

Certain non-Southern States did not like those decisions in the *Dred Scott* case, and in *Abelman* v. *Booth*.

The South seceded from the Union.

The right of secession was denied.

War ensued.

President Lincoln issued his Emancipation Proclamation.

But, neither that proclamation, nor the war, with its Appomattox, wiped out those decisions.

They were obliterated in the manner provided for in the supreme law of the land.

They were wiped out by the war amendments—the 13th, 14th, and 15th.

And when that 14th amendment was declared ratified, some of the women of the country thought that its language enabled them as well as male citizens to vote.

They were citizens.

The right of suffrage was a privilege or immunity of which the States no longer had the right to deprive them, they urged.

Not so, said the Supreme Court in 1875.

Forty-five years later the 19th amendment to the Constitution of the United States was adopted:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

In 1895, the Supreme Court of the United States held in the famous case of *Pollock v. Farmers Loan and Trust Company* that a certain income tax statute enacted by Congress violated the Constitution.

Eighteen years later the contract between the States known as the Constitution of the United States was amended so as to provide:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

Not only in our history of constitutional government have decisions of the Supreme Court been superseded by constitutional amendments, but statutes, constitutional provisions, governmental customs have been controlled by such amendments.

Back in 1919, we tried a "noble experiment." An amendment to the Constitution was adopted outlawing the manufacture, sale, and transportation of intoxicating liquors for beverage purposes.

It lasted 14 years.

That 18th amendment was repealed by the 21st, ratified December 5, 1933.

Until 1940, it had been the unbroken custom that no President should be elected to a third term.

That year, Franklin D. Roosevelt was elected to a third term.

Four years later he was elected to a fourth term.

He died in April 1945.

The custom was reestablished, and written into the fundamental law of the land by the 22d amendment, proposed in 1947, ratified in 1951.

So, I say in reference to the law of the land—if these decisions of the Supreme Court of the United States really reflect the will of the States of the United States, let the States so declare.

If they do not reflect the will of the States of the United States, let the States so declare.

Governor VANDIVER. The proposed Talmadge amendment, gentlemen, seeks merely to restore the rights of your State and mine over their educational systems, rights which they have held since their establishment.

The pioneers who settled this country, your forebears and mine, brought with them an inborn respect for law and order.

"Judicial tyranny" was an impossible circumstance for the Founding Fathers to conceive.

At the time of the drafting of the Constitution, no thought was given to the prospect of political judges, handpicked and screened by the Federal Justice Department, ofttimes on the basis of how they would rule in a given circumstance rather than their overall judicial capabilities for administering impartial justice.

Nor did the Founding Fathers entertain any idea that political judges might attempt to usurp the legislative power of Congress.

I would like to invite your attention to what Alexander Hamilton wrote in letter No. LXXVIII of the "Federalist" (pp. 576 and 578):

* * * the general liberty of the people can never be endangered so long as the judiciary remains truly distinct from both the legislative and the executive * * *. The complete independence of the courts of justice is peculiarly essential in a limited constitution * * *. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be, regarded by the judges as a fundamental law. It must therefore belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body * * *.

* * * They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

* * * In regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indi-

cate * * * that the prior act of a superior, ought to be preferred to the subsequent act of an inferior and subordinate authority * * *.

* * * The courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequences would equally be the substitution of their pleasure to that of the legislative body.

* * * To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them * * * hence, it is, that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges.

Unfortunately, Alexander Hamilton did not foresee the day when so-called modern authorities and sociological textbooks would replace the law of the land, overturn the Constitution and destroy the doctrine of stare decisis.

Unfortunately, Mr. Hamilton did not foresee the day when judges would seek to legislate and to amend the Constitution through judicial process, rather than in the manner prescribed, and whose consummate judicial skills might be limited to service on a police court bench or admission to the bar with no general practice of the law behind them.

The Founding Fathers realized that in a national government you have got to have a supreme court to pass on the laws.

That is admitted. I don't quarrel with that.

It is when the Court starts enacting laws and starts rewriting the Constitution, that it calls for apprehension and grave concern on the part of freedom-loving Americans everywhere.

So long as the judiciary confines itself to its proper sphere of action, there can be no complaint (Hamilton in the Federalist, No. XXII). When the actions of the judiciary are beyond the proper sphere, checking and balancing must commence.

To me, Senator Sam J. Ervin, Jr., U.S. Senator from North Carolina and a former associate justice of the North Carolina Supreme Court, in an article in last week's U.S. News & World Report (May 11, 1959, at p. 120), went to the heart of the issue in a feature article, titled, "The Power To Interpret Is Not the Power To Amend." In it, the Senator wrote, convincingly:

Let us consider and weigh the reasoning of those who seek to justify the proposition that it is permissible for the Supreme Court to amend the Constitution under the guise of interpreting it.

Their arguments rest upon a wholly fallacious premise, namely, that * * *: "The method of amendment authorized by article V is too cumbersome and slow. Consequently, the Supreme Court must do the amending. The alternative is to let the Constitution freeze in the pattern which one generation gave it."

If the thesis that a majority of the members of the Supreme Court have the rightful power to change the meaning of the Constitution under the guise of interpreting it every time a sitting Justice wavers in mind or a newly appointed Justice ascends the Bench should find permanent acceptance, the Constitution would become, to all practical intents and purposes, an uncertain and unstable document of no beneficial value to the country.

Yea, more than this, he says, it would become a constant menace to sound government at all levels, and to the freedom of the millions of Americans who are not at liberty to join Supreme Court Justices in saying that Supreme Court decisions are not binding on them.

I agree with Senator Ervin in his observations and admire him for stating them with such candor and forcefulness.

Because of the forthrightness and clarity of thought contained in Senator Ervin's article, I ask consent of the chairman and this sub-

committee that it be printed in the record at this place in my remarks.

Senator KEFAUVER. Without objection, so ordered.

(The document referred to follows:)

THE POWER TO INTERPRET IS NOT THE POWER TO AMEND

(By Senator Sam J. Ervin, Jr., Former Associate Justice, North Carolina Supreme Court)

To be sure, all Americans should obey court decrees in cases to which they are parties, even though they may honestly and reasonably deem such decrees unwarranted. But it is sheer intellectual rubbish to contend that Americans are required to believe in the infallibility of judges, or to make mental obeisance to judicial aberrations. They have an inalienable right to think and speak their honest thoughts concerning all things under the sun, including the decisions of Supreme Court majorities.

The truth is that on many occasions during recent years the Supreme Court has usurped and exercised the power of the Congress and the States to amend the Constitution while professing to interpret it.

A study of the decisions invalidating State action and State legislation compels the conclusion that some Supreme Court Justices now deem themselves to be the final and infallible supervisors of the desirability or wisdom of all State action and all State legislation.

Congress is told by the Supreme Court that it really did not mean what it said in exceedingly plain English when it enacted statutes to regulate the naturalization of aliens and to punish criminal conspiracies to overthrow the Government by force.

Congress is told by the Court that its committees must conduct their investigations according to rules imposed by the Court which make it virtually certain that no information will ever be obtained from an unwilling witness.

California is told by the Court that it cannot punish its residents for criminal offenses committed within its borders if such residents are ignorant of the statutes creating such criminal offenses.

California and New Mexico are told by the Court that they cannot determine the fitness or qualifications of those who apply to them for licenses to practice law in their courts.

New Hampshire and Pennsylvania are told by the Court that they cannot investigate or punish seditious activities within their borders.

New York is told by the Court that it cannot prescribe standards of propriety and fitness for its teachers.

North Carolina is told by the Court that it cannot determine the status of its own citizens within its own borders.

Pennsylvania and the trustees of the will of Stephen Girard, who has slumbered "in the tongueless silence of the dreamless dust" for 126 years, are told by the Court that the 14th amendment empowers the Court to write a post-mortem codicil to the will which Stephen Girard made while he walked earth's surface and entertained the belief that disposing of private property by will is a matter for its owner rather than judges.

Let us consider and weigh the reasoning of those who seek to justify the proposition that it is permissible for the Supreme Court to amend the Constitution under the guise of interpreting it.

Their arguments rest upon a wholly fallacious premise, namely, that the power to interpret and the power to amend are identical. The power to interpret the Constitution is the power to ascertain its meaning, and the power to amend the Constitution is the power to change its meaning.

It seems at first blush that those who advance these arguments overlook the significant fact that article V of the Constitution vests the power to amend the Constitution in the Congress and the States, and not in the Chief Justice and Associate Justices of the Supreme Court. But not so. They simply nullify article V with these neat assertions:

"The method of amendment authorized by article V is too cumbersome and slow. Consequently, the Supreme Court must do the amending. The alternative is to let the Constitution freeze in the pattern which one generation gave it."

To a country lawyer, this is merely a "highfalutin" way of saying that the oath of a Supreme Court Justice to support the Constitution does not obligate him to pay any attention to article V or any other provision displeasing to him.

If the thesis that a majority of the members of the Supreme Court have the rightful power to change the meaning of the Constitution under the guise of interpreting it every time a sitting Justice wavers in mind or a newly appointed Justice ascends the bench should find permanent acceptance, the Constitution would become, to all practical intents and purposes, an uncertain and unstable document of no beneficial value to the country.

Yea, more than this, it would become a constant menace to sound government at all levels, and to the freedom of the millions of Americans who are not at liberty to join Supreme Court Justices in saying that Supreme Court decisions on constitutional questions are not binding on them.

Governor VANDIVER. There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the commission under which it is exercised, is void.

No ruling of the Supreme Court, therefore, contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the judges of the court are superior to the people themselves; that men, acting by virtue of their powers, may do not only what their powers do not authorize, but what they forbid.

A decision outside the scope of its constitutional authority may be proclaimed by the Court as "the law of the land."

It may be enforceable upon an unwilling populace at the point of an unsheathed bayonet. But it is still, nonetheless, invalid and an abuse of the public trust.

Gentlemen, it is folly for anyone to suggest that the Constitution could intend to enable Judges of the Supreme Court to substitute their will for the will of the people, as expressed in the Constitution, and for the will of the people who created the very Court itself.

Not only in the school cases, but in other areas as well, the court, disturbingly, has overstepped the bounds of its authority.

Carried to the extreme, the Court even has invaded the prerogatives of Congress to tell it that its committees must conduct their investigations according to rules imposed by the Court which make it virtually certain that no information ever will be obtained from an unwilling witness.

As Senator Ervin so ably stated:

A study of the decisions invalidating State action and State legislation compels the conclusion that some Supreme Court Justices now deem themselves to be the final and infallible supervisors of the desirability or wisdom of all State action and all State legislation.

I do not need to tell you gentlemen that is a sad state for the Republic.

It is a sad state which must be corrected.

Let the Congress exercise its responsibility to the people.

Let me heed the warning sounded by Hamilton in the Federalist (Letter No. LXII) that—

Every nation * * * whose affairs betray a want of wisdom and stability, may calculate on every loss which can be sustained from the more systematic policy of its wiser neighbors. But the best instruction on this subject is unhappily conveyed to America by the example of her own situation. She finds that she is held in no respect by her friends; that she is the derision of her enemies; and that she is a prey to every nation which has an interest in speculating on her fluctuating councils and embarrassed affairs.

While all manifestations of judicial encroachment are of general concern, the decision in the school cases and those implementing it are of an immediate nature demanding our earliest attention.

In each succeeding pronouncement, the Court becomes harsher and harsher until it hit a crescendo in the Little Rock "prejudgment" in which it proclaimed to all States, "either you have integrated schools or no schools at all."

To a people like Georgians, who spend close to 55 percent of all State revenues on education and who recognize its value, such a pronouncement was cruel, indeed.

I understand that it was asked this morning if any statistics were available on capital expenditures on education in our State, and I have such statistics relating to Georgia's progress in the field of education that we have compiled in the form of a memorandum.

If the Chair has no objection, I request that the subcommittee allow this memorandum to be printed in the record of the committee at this point.

Senator KEFAUVER. Without objection, it will be so printed.

(The document referred to follows:)

EXHIBIT B

We are making progress in Georgia in all fields of endeavor. The far-reaching State school building program under which new, modern buildings have been built for the children of both races and the equalization of teachers' salaries for white and colored teachers are examples of tangible progress. Great strides in welfare assistance, health, and other State governmental undertakings in the past decade are other examples of what I mean.

Colored citizens have shared heaviest in these new benefits.

Permit me to emphasize that Georgia leadership pushed this policy to successful cumination in our State, not because of any external compulsion, but because we considered it right from every standpoint.

The achievement of which we are most proud in Georgia is the $300 million school building program carried on by State and local communities, the majority of which was made possible through financing of the State school building authority.

During the period July 1, 1952, to July 1, 1958, 150 county school systems and 36 independent systems saw their school plants transformed in many cases from rundown shacks to the most modern structures.

For your information, the breakdown on funds was approximately, as follows:

State—$162 million;
Local participation, $5 million;
100 percent local, $100 million;
Federal, $29 million.

In Georgia, we have in the public schools 654,592 white children and 305,819 colored children.

Teaching them, we have 23,286 white teachers and 9,943 colored teachers.

There is equalization of facilities and equalization of teachers' salaries with equal pay for equal experience and academic qualifications.

Since its creation in 1952 the Georgia State School Building Authority has underway or completed 481 new school plants, 354 additions to existing plants, 166 remodeling projects, all of which represent a grand total of 10,234 instructional units, costing $162½ million in State funds.

This does not include other similar structures built with purely local funds or Federal money in impacted areas.

It no doubt will interest you to know that of the total, over 50 percent, went to provide entirely new buildings for colored children though the percentage of colored to the total population is only slightly over 30 percent.

Additions and remodeling were confined largely to plants serving white children.

We have solved and are solving our statewide school housing problem to the satisfaction of both races.

Neither race wishes to give up its building, its autonomy, nor its teachers.

EXHIBIT C

[U.S. News & World Report, May 11, 1959]

THE POWER TO INTERPRET IS NOT THE POWER TO AMEND

(By Senator Sam J. Erwin, Jr., former associate justice, North Carolina Supreme Court)

To be sure, all Americans should obey court decrees in cases to which they are parties, even though they may honestly and reasonably deem such decrees unwarranted. But it is sheer intellectual rubbish to contend that Americans are required to believe in the infallibility of judges, or to make mental obeisance to judicial aberrations. They have an inalienable right to think and speak their honest thoughts concerning all things under the sun, including the decisions of the Supreme Court majorities.

The truth is that on many occasions during recent years the Supreme Court has usurped and exercised the power of the Congress and the States to amend the Constitution while professing to interpret it.

A study of the decisions invalidating State action and State legislation compels the conclusion that some Supreme Court Justices now deem themselves to be the final and infallible supervisors of the desirability or wisdom of all State legislation.

Congress is told by the Supreme Court that it really did not mean what it said in exceedingly plain English when it enacted statutes to regulate the naturalization of aliens and to punish criminal conspiracies to overthrow the Government by force.

Congress is told by the Court that its committees must conduct their investigations according to rules imposed by the Court which make it virtually certain that no information will ever be obtained from an unwilling witness.

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California and New Mexico are told by the Court that they cannot determine the fitness or qualifications of those who apply to them for licenses to practice law in their courts.

New Hampshire and Pennsylvania are told by the Court that they cannot investigate or punish seditious activities within their borders.

New York is told by the Court that it cannot prescribe standards of propriety and fitness for its teachers.

North Carolina is told by the Court that it cannot determine the status of its own citizens within its own borders.

Pennsylvania and the trustees of the will of Stephen Girard, who has slumbered "in the tongueless silence of the dreamless dust" for 126 years, are told by the Court that the 14th amendment empowers the Court to write a postmortem codicil to the will which Stephen Girard made while he walked earth's surface and entertained the belief that disposing of private property by will is a matter for its owner rather than judges.

Let us consider and weigh the reasoning of those who seek to justify the proposition that it is permissible for the Supreme Court to amend the Constitution under the guise of interpreting it.

Their arguments rest upon a wholly fallacious premise, namely, that the power to interpret and the power to amend are identical. The power to interpret the Constitution is the power to ascertain its meaning, and the power to amend the Constitution is the power to change its meaning.

It seems at first blush that those who advance these arguments overlook the significant fact that article V of the Constitution vests the power to amend the Constitution in the Congress and the States, and not in the Chief Justice and Associate Justices of the Supreme Court. But not so. They simply nullify article V with these neat assertions:

"The method of amendment authorized by article V is too combersome and slow. Consequently, the Supreme Court must do the amending. The alternative is to let the Constitution freeze in the pattern which one generation gave it."

To a country lawyer, this is merely a "highfalutin'" way of saying that the oath of a Supreme Court Justice to support the Constitution does not obligate him to pay any attention to article V or any other provision displeasing to him.

If the thesis that a majority of the members of the Supreme Court have the rightful power to change the meaning of the Constitution under the guise of in-

terpreting it every time a sitting Justice wavers in mind or a newly appointed Justice ascends the bench should find permanent acceptance, the Constitution would become, to all practical intents and purposes, an uncertain and unstable document of no beneficial value to the country.

Yea, more than this, it would become a constant menace to sound government at all levels, and to the freedom of the millions of Americans who are not at liberty to join Supreme Court Justices in saying that Supreme Court decisions on constitutional questions are not binding on them.

Governor VANDIVER. The issue thus posed, seemingly irreconcilable, has divided the best minds in the country.

There are those who consider the decision "the law of the land" and who are determined to force its implementation regardless of the disastrous results.

There are others, like Senator Talmadge and myself, who consider the decision to be outside the scope of the Constitution and who are dedicated to seeking its reversal by every lawful means.

As Senator Talmadge has said:

Regardless of whether one accepts it or not, the Supreme Court's school decision is an accomplished fact which will remain until either it is reversed by the Court itself or is nullified or modified by Congress or the people.

And regardless of whether one likes it or not, the overwhelming majority of the people of the South neither will accept nor submit to the forced implementation of that decision and there is no prospect of any change in the foreseeable future.

That is the dilemma in which the Nation now finds herself.

That is the dilemma which the amendment proposed in S.J. Res 32 would dissipate.

In offering his proposal to the Senate, Senator Talmadge paid what I consider to be one of the most eloquent tributes ever uttered on the value of education. He declared:

With the exception of seeking the salvation of his immortal soul, man has no greater responsibility than seeing that his young are educated to the fullest extent of their abilities and are equipped spiritually and intellectually to achieve mankind's highest destiny.

With those thoughts, it is no wonder, then, that he was speaking the sentiments of Georgia people when he said "destruction of public education * * * would be an unparalleled tragedy * * *" and that Federal bayonets are not the answer —Federal control of education is not the answer" and that "Rearing a generation in ignorance is not the answer."

But the answer is this amendment proposal which would afford the States and their subdivisions a means to determine how and when their schools would comply with the Supreme Court's school decision.

It would give the people of America a basis for unity at a time when it is sorely needed.

Through its adoption the fabric of the American empire would be restored to the solid basis of the consent of the governed.

The streams of national power, once again confined to the proper banks, would flow from that pure original fountainhead of authority—the people, the mothers and fathers of these United States whose first concern is the welfare and destiny of their children.

It has been said that this amendment has no chance of adoption; that, Members of Congress, mostly, have succumbed to political motivation and are deaf to pleas for reason and commonsense.

Our very presence here today is ample disproof of this defeatist attitude.

It has been the history of this country in matters of governmental principle that men and women of conviction would not back down from a fight because the outcome may seem hopeless.

As this country moves on toward further greatness in the future and as she seeks solutions to her many and vexing problems and a reconciliation of her diverse interests, the judgments of many must unite in the task. Experience must guide our labor; and, time alone will bring it to perfection.

Senator KEFAUVER. Thank you very much, Governor Vandiver.

Any questions, Senator Dodd?

Senator DODD. No, I have no questions, except those I asked this morning, and I do not think I should ask each witness who appears here those questions.

I only asked my questions in order to make the record clear, and I do not know that there is any need to carry them further except one—maybe I will change my mind.

Governor, I wonder if you would give me your views on this problem: It has been claimed that the decision of the Supreme Court, the latest one, the 1954 decision, is a usurpation of power in pronouncing the doctrine of "equal facilities" rather than "separate but equal facilities."

What has troubled me for some time is this: If it is a usurpation in 1954, what was it in 1896? Is it not just——

Governor VANDIVER. Senator, I certainly think it is a usurpation of power not only of the States by the Supreme Court, but the Congress of the United States, and that under the 14th amendment you are given the privilege of implementing the 14th amendment.

The decision to which you make reference in 1896 (*Plessy* v. *Ferguson*, supra), was, in my opinion, an interpretation of the law, and followed the Constitution.

But I do not feel that the decision in 1954—*Brown* v. *The Board of Education of Topeka*, supra—followed the law. In fact, they disregarded all the precedents, and I think there was a disregard of the Constitution, and they based that decision not on the constitutional precedent, but on psychological and sociological grounds, and I do not think that is a firm basis for entering a decision.

Senator DODD. In the history of our Supreme Court, we have frequently seen the dissents become the majority opinion.

There was a dissent in the *Plessy* case by Justice Harlan, I believe. This is not uncommon in our Supreme Court's history.

Governor VANDIVER. Had they followed the Constitution, I would have no argument with that. However, I must say that I have a much higher regard for judges of the stature of Taft and Hughes than I do for the presently constituted Court.

Senator DODD. Alright. But my point was a little deeper. In 1896 the Court was ruling on a constitutional question, and it decided that "separate but equal" was satisfactory. You do not find any fault with that decision, but Justice Harlan did, and maybe other people did.

Now, 60 years later, another Court, in viewing a similar problem, adopts for all practical purposes the position of the dissent of Justice Harlan.

This has happened many times, I say, in our judicial experience.

Why do you say that the Court in 1954 has usurped powers and that the Court in 1896 did not?

Governor VANDIVER. Because this Court did not base its decision on the Constitution. They based it on psychological grounds and sociological grounds and some other nebulous grounds.

Senator DODD. Is that a usurpation of power? That may be a different interpretation.

Governor VANDIVER. Yes, sir. When they failed to follow the Constitution and they use these other grounds, I feel it is a usurpation.

Senator DODD. The Court in 1896 had used the same power that the Court in 1954 used.

Governor VANDIVER. I do not think they discussed psychological and sociological grounds in *Plessy* v. *Ferguson*.

Senator DODD. That is not a usurpation of power. It may be a difference in interpretation, but I do not see how you justify the charge that the power was usurped.

Governor VANDIVER. In effect, they amended the Constitution in that they took away from the rights of the States under the 10th amendment their power to operate the schools.

We have had that power, and never in our history has there been any challenge of the power before.

Senator DODD. Well, there have been some changes, not precisely of this kind. You know there have been several cases involving education in graduate schools.

Governor VANDIVER. Not in recent years, of course.

Senator DODD. Here is another problem that arose in my mind in hearing the testimony: If we adopt the amendment suggested by Senator Talmadge, we will not only, in effect, reverse the Supreme Court decision of 1954, but we will also reverse the Plessy decision of 1896, and, indeed, we will repeal the 14th amendment. Would you agree with that?

Governor VANDIVER. No, sir; not entirely.

Senator DODD. Tell me what you think.

Governor VANDIVER. It would repeal the 14th amendment as regards the usurpation of the power to operate our schools, but not the 14th amendment entirely.

Senator DODD. All right.

Let me rephrase my question: With respect to our public schools, we would have reversed the Brown and Plessy decisions, and we would have, as I read the Talmadge amendment, nullified or completely modified the 14th amendment with respect to this question of school facilities.

Governor VANDIVER. Yes, sir; and it would be a great day if it passed.

Senator DODD. I understand your view. But what will happen to the separate but equal doctrine that did not cause any difficulty in your mind? We will not have that any more either if the Talmadge amendment is adopted.

Governor VANDIVER. Well, the States themselves would then be allowed to operate their schools.

Senator DODD. As they see fit.

Governor VANDIVER. As they see fit.

Senator DODD. Don't you think we might have situations in this country that you and I would consider frightful? For example, suppose in some township or other political subdivision they decided that only Catholics could go to a local public school. What about that?

Governor VANDIVER. It might be true in some States; it would not be true in Georgia.

Senator DODD. Well, I am not picking out any one State. I am merely suggesting what can happen.

Governor VANDIVER. I do not think it will. I think that States are fully competent to provide an adequate educational system for their children.

Senator DODD. Don't you agree that we have all these decisions and we have all these statutes obviously because people did not do what they should? We would not need any laws, we would not need any courts, and we would not need any decisions if what I take to be your view was actually the fact of life.

The history of civilization has demonstrated that people do not behave that way; and yet, by this amendment, you throw it all out the window and, for all purposes, start all over again.

Governor VANDIVER. Senator, we are in fundamental disagreement that these decisions and laws have forced us into that. I do not know what statutes you have reference to. I do not think there have been any statutes passed in the Congress.

Senator DODD. I mean the whole history of——

Governor VANDIVER. There have been decisions——

Senator DODD (continuing). Of judicial review in this country, of hundreds of statutes, that is what I am talking about.

Governor VANDIVER. I will say this, Senator: The State of Georgia has virtually bankrupted itself trying to provide the separate but equal schools. I have some statistics in a memorandum showing what we are doing in Georgia, and I think the other States of the South are doing the same.

Senator DODD. I understand that, and I am not unsympathetic about it either. I have no emotional feeling about this, believe me. I do not live in an area where it is a problem, but I understand the problem of the people who do live in such areas, and I have tried, as I think many men have, to reason this out.

But this kind of approach confounds me. I simply cannot understand the charge of usurpation for this Court and not for the Plessy Court.

I cannot understand those who suggest that we simply wipe out Brown, Plessy, and the 14th amendment, and say everything will be all right. I think this is what troubles a lot of people.

Governor VANDIVER. Not until these recent cases did anyone realize that the 14th amendment dealt with schools, Senator.

As you recall, as was pointed out this morning by Senator Sparkman, I believe, that the Congress of the United States in 1869, which was a Congress that passed on this, on the 14th amendment, provided segregated schools in the District of Columbia.

Senator DODD. Yes, I know.

Governor VANDIVER. And did so until 1954.

I do not think that the 14th amendment or the intention of the Congress or the people was that it apply to schools.

Senator DODD. That is one viewpoint. As you know, there is a contrary viewpoint.

Governor VANDIVER. Well, history has indicated that, sir.

Senator DODD. I would not want it to appear that I am arguing this with you. I am actually trying to get your viewpoint and that of others.

What do you say to the proposition that was suggested here this morning that 10 or 12 States, through the enacting legislation which admits them to the Union, are permitted exclusive control of the public school system and, therefore, these 10 or 12 States have a special status as distinguished from the status of the others of the 50 States?

Before I ask you what you think, maybe I ought to be fair and tell you what I think of it. I said this morning that the acts of admission of these States, the latest being those involving Alaska and Hawaii, are all subject to constitutional restraint.

Would you agree with that?

Governor VANDIVER. Yes, sir. As was stated by Senator Talmadge and again by Senator Sparkman, I would have to agree with that.

Senator DODD. Then it was alternately suggested that whether they are subject to constitutional restraints or not, they may be in a special category because of a treaty relationship.

I suggested this morning that treaties are subject to constitutional restraints, and since then I have fortified my opinion. I am now sure that they are and always have been subject to constitutional restraint.

What do you say to that?

Governor VANDIVER. I think so. I think they certainly are. As Senator Talmadge pointed out, his purpose was to show it was the intention of Congress that the control of the schools be left to the States. That was his only purpose, in my opinion.

Senator DODD. Maybe so. I do not want to suggest what his purpose was. But I see this argument occurring and recurring in the testimony. People are going to read the printed hearings, and they may get the impression that we have granted some exclusive, peculiar jurisdiction to Hawaii and Alaska that we have denied to the other 48 States; and, as a matter of law, I submit to you, that is not so.

Governor VANDIVER. As a matter of fact, it was only since 1889 that that provision has been granted by the Congress and I think it has been granted to 12 States, not to the other States.

Senator DODD. But you get my point?

Governor VANDIVER. I understand your point, sir.

Senator DODD. That is all.

I am grateful to you for coming here. I think it is valuable and important that we get your views. I hope you do not get the impression that I am trying to be a devil's advocate.

Governor VANDIVER. No, sir; I appreciate your questions.

Senator KEFAUVER. Governor Vandiver, I have been reading with interest and appreciation the analysis in your statement about the 14th amendment, which is exhibit A.

As I understand it, the situation here is that the 14th amendment was adopted in 1868; and, in the *Slaughterhouse* cases in 1873, the Supreme Court first applied the 14th amendment in the general field we are talking about.

Then in *Plessy* v. *Ferguson* in 1896 they applied it in a transportation case, and said the equal protection clause was satisfied by the separate but equal doctrine.

Then, later on, they applied it to school facilities; and I suppose one of the most notable cases was in 1928——

Governor VANDIVER. *Gong Lum* v. *Rice.*

Senator KEFAUVER (continuing). The *Rice* case with the opinion by Chief Justice Taft. Following the theory of the *Plessy* case, the Court held in these cases that the separate but equal doctrine satisfied the 14th amendment as far as public schools were concerned.

Then we had a number of other cases. Finally, in 1954, the decision in the *Brown* case.

As Senator Dodd pointed out, this proposed amendment, as written, would except from the 14th amendment the administration of schools. I think Senator Talmadge agreed with this.

Would you prefer it that way or would you prefer it to go back to the separate but equal rule of the *Plessy* v. *Ferguson* case?

Governor VANDIVER. Certainly the separate but equal doctrine is suitable to the people in my State. We have made every effort to comply with it. It is not our purpose to destroy that doctrine at all.

Senator KEFAUVER. What do you think about this amendment in that regard?

Governor VANDIVER. Well, if the subcommittee sees fit to amend it and make it separate but equal, it certainly would be agreeable to the people in my State.

Senator KEFAUVER. Anything else, Senator Dodd?

Senator DODD. I wonder how the proposal could be amended to do that. It does not seem to me that it is subject to such an amendment.

Governor VANDIVER. That would be something that the subcommittee might study.

Senator DODD. I have done it, but I want to study it more thoroughly. It occurred to me that the proposal would wipe out the separate but equal doctrine, and I wonder how many people would be in favor of that.

If this amendment wipes out the separate but equal doctrine, would you support this amendment?

Governor VANDIVER. Yes, I would, because I do not think the fact that you wiped out the doctrine would change the situation at all. I think the States would still make an effort to comply with the doctrine, whether it was on the statute books or not, Senator.

Senator DODD. That is all I have

Senator KEFAUVER. Thank you very much, Governor Vandiver. I appreciate your coming.

Governor VANDIVER. Thank you, Senator.

Senator KEFAUVER. We appreciate your coming and giving us your viewpoints and your testimony.

Governor VANDIVER. Thank you.

Senator KEFAUVER. Our next witness is Senator Ross W. Dyer, who is accompanied by his distinguished Congressman from the Eighth Congressional District of Tennessee, Hon. Robert Everett, and we are most pleased to welcome both of these gentlemen.

Congressman Everett, do you wish to introduce Mr. Dyer?

Mr. EVERETT. Thank you, Mr. Chairman.

It is certainly a pleasure for me to be here this afternoon before this distinguished subcommittee to introduce one of the leading lawyers of west Tennessee, a former member of the constitutional convention of Tennessee a few years ago, a former member of the State Senate of the Tennessee General Assembly.

Mr. Dyer, as I have stated, is a leading lawyer in west Tennessee. He lives at Halls, Tenn., in Lauderdale County.

He is now the administrative assistant to Gov. Buford Ellington, the Governor of Tennessee.

I know that his testimony will be very beneficial to this subcommittee in its deliberations on this important amendment.

I give to you Mr. Ross Dyer, the executive secretary and administrative assistant to his honor, Gov. Buford Ellington, of Tennessee.

Senator KEFAUVER. Thank you very much, Congressman Everett.

I wish to join in extending a hearty welcome to Mr. Dyer. I have known Mr. Dyer favorably for many years, both as an able lawyer and as a public servant, and as a very useful member of the Tennessee Constitutional Convention not very long ago. We are glad to have you here, Mr. Dyer.

STATEMENT OF ROSS W. DYER, REPRESENTING GOV. BUFORD ELLINGTON, OF TENNESSEE

Mr. DYER. Thank you, Mr. Everett, for your kind introduction.

Mr. Chairman and members of the subcommittee, there are exactly 115 words in the amendment to the Constitution of the United States proposed by Senator Talmadge, and I believe they are the most important 115 words in America today insofar as the peaceful and equal education of our young people is concerned.

I speak as direct representative of Gov. Buford Ellington of Tennessee, and I believe that the testimony I present bears the heavy endorsement of the people of Tennessee.

Yet we speak not selfishly as one State, but rather as a people who join with people of other States in the belief that this proposed constitutional amendment will solve, with premeditated speed, the grave problem that was suddenly thrust upon all America in the matter of public education under the Supreme Court decision of 1954.

I am not going into such details as the violence that we have known in Tennessee or that the people of Little Rock knew, because in many instances of changes a people must undergo as a nation develops, violence is often the unhappy but the inevitable accompaniment.

Rather, I should like to present to you a statement which has its keynote in the following lines that appeared editorially in the Nashville Banner on April 29, 1959:

> Tennessee is formally and officially on record for the Talmadge amendment—to spell out State controls exclusively for the public school system.
>
> The Talmadge legislation is simply an enabling act, by which Congress would authorize submission of the amendment for the people of America to decide. It would put into the Constitution by express language the provision commonly and historically recognized under the Supreme Court decision of May 17, 1954: namely, that the public schools are State and local institutions, and subject to their regulation.
>
> The 1959 general assembly unanimously approved a resolution memorializing the Tennessee congressional delegation to use it's best efforts on behalf of this legislation.

The State legislature unquestionably spoke in this resolution the sentiment of Tennessee, and it is difficult to see how the constituency of any State could fail to back an amendment addressed so directly to the basic issue involved.

The defense of States rights is both paramount and urgent.

Congress has the opportunity to act to that end—not arbitrarily, but by leaving questions for the people to decide, where the right and responsibility of decision belong.

Senator KEFAUVER. Mr. Dyer, looking over your statement I do not believe you have set forth the resolution adopted by the Tennessee General Assembly.

Mr. DYER. No, sir; I have not.

Senator KEFAUVER. We have a copy here. Suppose we make it a part of the record following your statement.

Mr. DYER. I would be pleased if you would do so.

Senator KEFAUVER. Without objection, it will be printed in the record.

Mr. DYER. As Governor Ellington pointed out earlier this month in a public speech, there is ample precedent for the Federal Government deliberately to refrain from the interference with certain major obligations of the people of this Nation. He cited specifically the fact that the Federal Government, after some harsh and violent experiences, had found it advisable to leave the processes of conscription in local hands.

I should like to quote directly and briefly from some of Governor Ellington's speech along that line:

When the Federal Government enacted the draft law, it was very plainly stated in all the arguments for its passage that it should not be run at the top Federal level, but that what a young man had to do about compulsory military service could best be determined in his own home territory by a local board composed of his neighbors.

That turned out to be sound political philosophy.

It worked in World War I, it worked in World War II, it worked in the Korean war, and it has worked in peacetime.

The Supreme Court never attacked it.

The Supreme Court never tried to federalize it.

The Supreme Court never disagreed with the theory that decisions at the local level were best for operation of the nationwide draft.

Well, why isn't that theory good enough to handle other grave requirements on our people, including public education?

If the Federal Government had attempted during World War I or World War II, or the Korean war to run the draft law at the highest Federal level, I have no doubt but that there would have been draft riots like those in New York when Federal agents, during the Civil War, attempted to run the conscription law.

We would have seen bayonets backing up the draft law if agents of the Pentagon had come into our local communities to enforce it. History of conscription in America has shown that.

But local boards took over—neighbors decided about neighbors—and the draft law that produced nearly 4 million men during World War I and 16 million during World War II, worked smoothly and won wars.

Given similar freedom of governmental action at the local level, all our young people, of whatever race or creed, will be equally, fairly, and properly educated—and there will never be the necessity for paratroopers to drop down upon us and place bayonets in our backs.

Gentlemen, I ask you to give the people of America the right, through their duly elected legislative bodies, to say whether or not they want written into the Constitution of the United States those 115 words I spoke to you about in the beginning of the testimony that read:

Administrative control of any public school, public educational institution, or public educational system operated by any State or by any political or other subdivision thereof, shall be vested exclusively in such State and subdivision and nothing contained in this Constitution shall be construed to deny to the residents thereof the right to determine for themselves the manner in which any such school, institution, or system is administered by such State and subdivision.

Whether a majority of the Congress is in support of the Talmadge proposal, or whether a majority of the Congress is opposed to the resolution in principle, I think that the Congress should at least allow the legislatures of the various sovereign States the right to pass on this matter.

The Supreme Court cannot bestow that right on the States.

The Congress can.

If you gave to the 49th State exclusive and perpetual control of its public schools and colleges, then why not do it for the 16th State which is Tennessee, and for all the other States from the 1st to the 50th?

I do not think that the principal argument before you today is whether the Supreme Court was right or wrong in its decision or whether some of our States are right or wrong in their approach and attitude to the problem, but rather that the principal question is whether you, as the Congress of the people, shall again give to the sovereign States the right to say by a three-fourths majority whether they want or do not want this proposed amendment to the Constitution.

That is what we are asking.

We are not asking that the Congress attempt to undo a Supreme Court decision.

We are asking that the Congress give to the American people the same consideration that it gives to the Supreme Court and, therefore, that the American people, through their legislatures, be permitted to express their will on this most momentous of all problems on the domestic front.

Thank you, Mr. Chairman, that is all the prepared statement I have, sir.

Senator KEFAUVER. Thank you very much, Mr. Dyer.

(The resolution previously referred to is as follows:)

HOUSE JOINT RESOLUTION 36

(By Shelby Delegation)

A Resolution memorializing the Tennessee delegation to the Congress of the United States to exert its best efforts in behalf of an amendment to the Constitution of the United States proposed by Senator Herman Talmadge

Whereas the public school system of Tennessee and of each State is the responsibility of the States individually, and should be subject in all particulars exclusively to State and local jurisdiction; and

Whereas Senator Herman Talmadge of the State of Georgia has proposed an amendment to the Constitution of the United States which would assure that administrative controls be vested in the hands of the individual States and their subdivisions; and

Whereas the bedrock principle of constitutional government is the right of the people to decide; and

Whereas this principle of local control of local affairs was honored in this Nation until the judicial trespass in 1954 by the U.S. Supreme Court; and

Whereas the proposed Talmadge amendment seeks neither segregation nor integration in the public schools, but would leave each State free to make its own decisions in this regard; and

Whereas seven Senators from our sister Southern States have joined Senator Talmadge in his proposal to protect the rights of States and local governments in this important area: Now, therefore, be it

Resolved, That this 81st General Assembly of the State of Tennessee express by resolution its sentiment strongly in favor of the amendment to insure local control of local affairs and that it memorialize the Tennessee delegation to the Congress to exert its best efforts in behalf of the proposed amendment; and be it further

Resolved, That copies of this resolution be forwarded to Senator Herman Talmadge with our thanks for his leadership in this important undertaking and to the Tennessee congressional delegation with our urgent request for their support.

Adopted March 18, 1959.

JAMES L. BONAR,
Speaker of the House of Representatives.
WM. Q. BAIRD,
Speaker of the Senate.

Approved March 21, 1959.

BUFORD ELLINGTON,
Governor.

Senator KEFAUVER. Any questions, Senator Dodd?

Senator DODD. I am going to get a bad reputation at this hearing if I question everybody.

I would like to ask you a question about the analogy that you draw between the Selective Service Act and this situation. We had a National Selective Service Act.

Mr. DYER. I am drawing it for this reason: As it was written—with some exceptions I will admit—the principle involved was local determination.

Senator DODD. But all the local people did was carry out the provisions of the act.

Mr. DYER. Well, they had the people thinking that they were doing it right.

Senator DODD. That is just the point. I am afraid your statement may lead people to think that there is an exact or nearly exact analogy, and I respectfully submit to you that there is not.

Mr. DYER. I think in principle there is, Senator, but I would not say it was exact. I would not just say that, but the principle involved is, I think, the same.

Senator DODD. That is precisely the point.

Let us suppose that a local Selective Service Board had decided that young colored men would not be accepted in the military service. Do you have any doubt that the Federal Courts (or the Supreme Court, perhaps, as the last resort) would have restrained that kind of action?

Mr. DYER. No, sir, I have no doubt. That presumes that a governing body like the Selective Service would not constitutionally do its duty. I do not presume so.

Senator DODD. Well, now, there are lots of cases out of the Selective Service Act that went to the Supreme Court.

Mr. DYER. Yes, sir; I understand that, but I am not too familiar with them personally.

Senator DODD. I do not want to press this point, but I can assure you that the administration of the Selective Service Act, although carried on by local boards, was at all times under court restraint and under national supervision by General Hershey and a large group of officers

who assisted him, and the part that the local boards played was simply to carry out the requirements of that act.

Mr. DYER. Thank you.

Senator KEFAUVER. Any further questions?

Mr. FENSTERWALD. No questions, Senator.

Senator KEFAUVER. Thank you very much.

Mr. DYER. Thank you.

Senator KEFAUVER. Our next witness is Mr. Tyre Taylor, general counsel, Southern States Industrial Council. We are glad to have you with us, Mr. Taylor.

Mr. TAYLOR. Thank you, sir. It is a very great honor and a privilege to appear before this distinguished subcommittee.

Senator KEFAUVER. Well, now, Mr. Taylor, I have been here for quite a long time on various committees, and you have appeared before the Small Business Committee and several others.

Mr. TAYLOR. Yes, sir.

Senator KEFAUVER. It is always good to see you.

Mr. TAYLOR. Thank you, sir.

Senator KEFAUVER. All right, sir. You may proceed with your statement.

STATEMENT OF TYRE TAYLOR, GENERAL COUNSEL, SOUTHERN STATES INDUSTRIAL COUNCIL

Mr. TAYLOR. I start with an assumption which, at this stage of history, cannot be proved and is certain to be challenged.

This assumption is that public school integration is totally unenforcible in large areas of the South; that in these areas the Supreme Court's pestilential decree has been, is being, and will continue to be nullified and defied; that opposition to it—already strong—is growing in other parts of the South and in the country as a whole; and that the question is not whether this attempted act of judicial tyranny will be modified to take into account the realities of the situation, but only when.

Why do I say this? I say it because in a country where the people have a free ballot, no constitutional amendment, no law or statute, and no court decision can be enforced without the support, or at least acquiescence, of the people to whom it applies. This truth is affirmed as self-evident in the Declaration of Independence, which rightly and ringingly asserts that, "Governments are instituted among men, deriving their just powers from the consent of the governed."

Although the parallel is not exact, let us consider for a moment the abysmal failure of national prohibition. In that ill-fated experiment, no one was in any hurry. There were long years of advance preparation, education, groundwork, preparing the public mind for the innovation that was to come. And it was not so great an innovation at that.

Many States were already dry; the leaders of the movement held that no move should be made until at least two-thirds of the States were dry and even then, prohibition, they held, must come by constitutional amendment, not by statute. Finally, the amendment was proposed by an overwhelming majority of both Houses of Congress

and was ratified by three-fourths of the State legislatures within 13 months. Eventually it was ratified by 46 of the 48 States.

In subsequent years, the drys won elections with monotonous regularity. For example, in 1926, 35 Senate seats were up. The drys won 29. After that election, there were only five wet Governors left in the entire United States. And yet—less than 10 turbulent years later—prohibition was totally discredited—washed up and out, with no one to mourn its passing. Why?

I will let Mr. Deets Pickett, who represented the Methodist Board of Temperance here in Washington during the prohibition era, answer that question. In a recent article in the Washington Evening Star significantly entitled "Integration—Another Noble Experiment," Mr. Pickett says there were perhaps many reasons for the failure of prohibition, but that two stand out:

> Many people felt—

he says—

> that they were being coerced in a matter which should have been reserved to their own decision. They would not be placated; they defied the law, they cooperated with the illegal traffic; above all, they complained at the top of their voices.

His recommendation and conclusion:

> Return responsibility for education to the States. Eventually; why not now.

"Eventually" could, of course, be a very long time, perhaps forever. People are reluctant to admit their mistakes. For this reason, few, if any, entertain the hope that the Supreme Court will ever reverse its decision. Then, too, a lot of politicians from the big cities of the North and West have a vested interest in keeping the controversy alive, as, of course, do the Communists.

So what is the prospect if Senate Joint Resolution 32—or something like it—is not proposed by Congress and ratified by the States?

It is, I submit, about the bleakest, most sterile and dangerous prospect imaginable.

It is a prospect of controversy as the protest of the people against this attempted act of judicial tyranny steadily mounts.

It is a prospect of closed schools.

The other day, I heard Mr. Charles J. Bloch, a distinguished lawyer of Macon, Ga., tell the House Judiciary Committee what that State intends to do if ever there is a court order which applies to it forbidding segregation. He said Georgia would close its public schools—a course required by its State Constitution—and that, thereafter, the Federal Government could have no interest in education in Georgia. He said they would return to private schools, which would be fully segregated; and that tuition grants would be made by the State to aid students, both white and colored, to attend them.

All this would, of course, require time for the changeover, during which the children themselves—both white and colored—would be the chief sufferers. This is probably what Senator Talmadge had in mind when, in introducing Senate Joint Resolution 32 on behalf of himself and eight other southern Senators, he said:

> The destruction of public education in an entire region of our Nation would be an unparalleled catastrophe.

Embittered controversy, crimination and recrimination, endless lawsuits, frustration, perhaps violence and bloodshed, these are all in the melancholy prospect which lies ahead unless a way out of this terrible impasse can be found.

But that is not all.

Consider for a moment this Nation's posture and position before the world.

The cold war rages on unabated. It could become a hot war at any moment, either by design of the Reds or by accident. There is even serious talk—how serious it is I have no way of knowing—of establishing and maintaining a constant air alert, which I gather means keeping a large number of fully armed planes in the air at all times to prevent their destruction on the ground.

Khrushchev has said that the Russians will bury us.

In the face of this constant and ever-mounting threat, we have glued together—mostly with American arms and money—a defensive alliance which could come apart at the seams with the dropping of the first hydrogen bomb, leaving us isolated to face alone the implacable enemies of the free world.

It can be said, I think without fear of successful contradiction, that never in all its history has this Nation been in such mortal peril, or needed more for its own security the internal unity with which to combat this peril.

Do we now have this unity?

To ask that question is to answer it. Of course we do not have it. Instead, we have a bitter, internal struggle going on which is just short of civil war and which has already been attended by the use of bayonets at Little Rock.

We face our enemies as a frustrated, strife-ridden, bewildered Nation, divided and torn apart, with race set against race and section against section.

And all the time we are fighting among ourselves the Communist cancer spreads, sending its malignant roots and cells deeper and deeper into the political system of every country in the world, including the United States.

The situation created by the Court's integration decisions could not be more to the Communists' liking if they had planned it themselves.

Unless we are bent, as we sometimes appear to be, upon national suicide, we must find some way to correct this ghastly mistake. Two courses present themselves.

One is to sit by and do nothing and let nature take its course. As I have tried to demonstrate, that way lies a long period of internal unrest and dissension and even potential destruction of this Nation by foreign enemies.

The other is to return control of the public schools to the States and localities as is proposed in Senate Joint Resolution 32.

If California or New York want integration, let them have it, this resolution says.

But if South Carolina or Georgia do not want it and will have none of it, that is a matter for them to decide.

At this point, I should like to raise the question about the amendment in its present form. Many of us feel that the Supreme Court's integration decision was a brutal usurpation of legislative power;

that—leaving out of consideration the dubious validity of the 14th and 15th amendments themselves by reason of the manner in which they were adopted—section 5 of the former provides that—

> Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Congress has not acted, and if we assume, a somewhat violent assumption, I will admit, that the 10th amendment is still valid and a part of the Constitution, then Senate Joint Resolution 32, by singling out and naming only one of the powers reserved to the States, namely, control of public education, might be interpreted as weakening the 10th amendment. This possibility could be eliminated by the addition of a single sentence saying, in effect, that the adoption of this amendment shall not be interpreted as weakening or derogating from any of the other powers reserved to the States or the people by the 10th amendment.

And this brings me to a concluding thought—quite possibly the product of nostalgia—which I should like to leave with you. It may not seem relevant to this discussion, but I think it is. It is this:

One of the great sources of our strength and vitality as a nation has been not uniformity, but variety. In customs, in likes and dislikes, in the manner in which they earned their livelihoods, in religious beliefs or nonbeliefs, in their attitudes toward life and toward each other, and in a multitude of other respects, Americans could be and were different.

In some instances, these individual differences were influenced by climatic and other natural causes. In others, the differences could be attributed to different racial strains and nationalities and to different traditions.

A traveler from Maine to Louisiana to California and back through the Middle West would encounter a number of different regional cultures and economies, some primarily agricultural, some industrial, some maritime, some simple and primitive, some complex, and so on.

The point is that, up until recent years, there was no such thing as an average American. There was no mass man, no "man in a grey flannel suit," and no talk of "the century of the common man." Instead, there was a whole vast, vibrant congeries of individuals each living his own life and pursuing his own happiness in his own way.

Of course, in such a society, States rights and local self-government flourished. This was the golden period of the "indestructible union of indestructible States." Authority was diffused, with the Federal Government operating on the theories of separation of powers and reserved powers and, until the 16th amendment, touching the lives of the citizens lightly, if at all.

Obviously, such an atmosphere made for self-reliance, individual initiative, and an independence of outlook and spirit which the mass man could never know.

Individual liberties were deep-rooted and the wide diffusion of governmental power made the rise of dictatorship next to impossible.

The differences between people, States, and regions—fully recognized and accepted—made for tolerance and an accommodation as between all classes of society and between whites and blacks.

During the 40 years preceding the integration decision, the Negroes—with the help of the whites—made more real progress than any other race during any similar period in history.

Senate Joint Resolution 32 represents a sharp turnabout from the egalitarian, totalitarian direction in which we have been traveling. We support it and hope it may be favorably reported by this subcommittee and the full committee.

I thank you, gentlemen.

Senator KEFAUVER. Thank you very much, Mr. Taylor.

Any questions?

Senator DODD. I do not have any.

Senator KEFAUVER. Any questions?

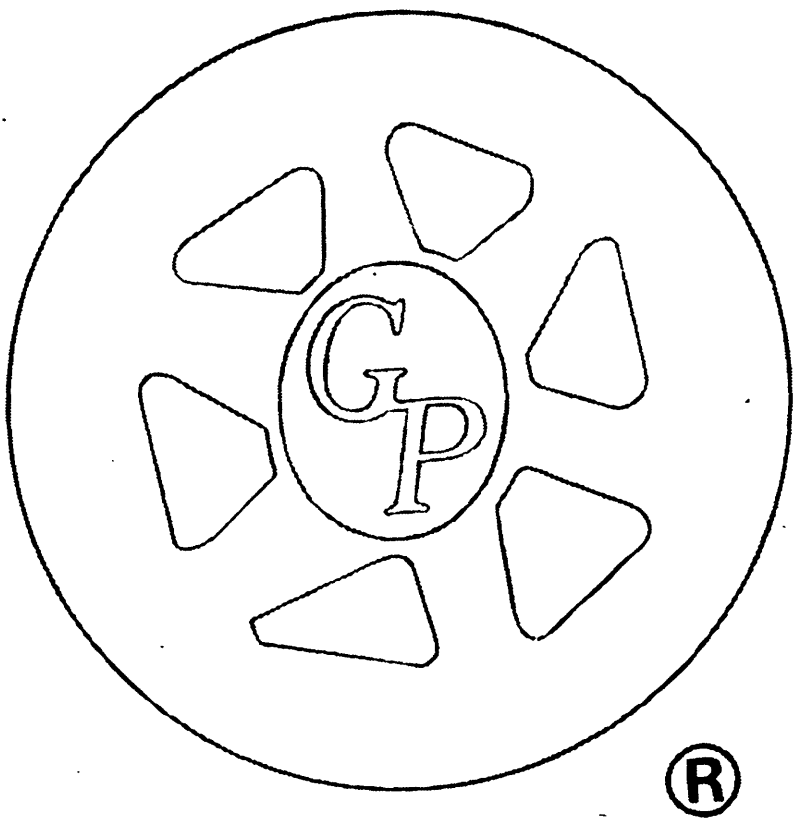
Mr. FENSTERWALD. No questions, thank you.

Senator KEFAUVER. Thank you very much, Mr. Taylor.

Mr. TAYLOR. Thank you, sir.

Senator KEFAUVER. Tomorrow morning we meet in room 135 at 10 o'clock, and we will stand in recess until 10 o'clock in the morning.

(Whereupon, at 3:20 p.m., the subcommittee recessed, to reconvene at 10 a.m., Wednesday, May 13, 1959.)



CONSTITUTIONAL AMENDMENT RESERVING STATE CONTROL OVER PUBLIC SCHOOLS

WEDNESDAY, MAY 13, 1959

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:10 a.m., in room 135, Senate Office Building Hon. Estes Kefauver (chairman of the subcommittee) presiding.

Present: Senators Kefauver and Dodd.

Also present: Bernard Fensterwald, counsel; Peter N. Chumbris, representing Senator Langer; and Kathyrn Coulter, subcommittee clerk.

Senator KEFAUVER. The subcommittee will come to order.

We are glad to have Mr. Peter Chumbris, who is here representing Senator Langer. Senator Langer is in the Foreign Relations Committee, as I understand. We will be glad to have you participate with us, Mr. Chumbris.

Mr. CHUMBRIS. Thank you, sir.

Mr. FENSTERWALD. Mr. Chairman, I wish to make several announcements for the record.

I had a call this morning from Mrs. Eva Barker, who is on the staff of the Sons of the American Revolution, and she informed me that Mr. Putnam, who was to appear this morning, is ill and will be unable to attend. He will file a statement for the record.

Senator KEFAUVER. When his statement is received we will have it printed in the record.

Mr. FENSTERWALD. I also received a call from Senator Talmadge's office to inform me that Mr. Carl Rix and Mr. Loyd Wright will be unable to appear. They want to appear at a later date.

I would also like your permission to read into the record a letter which I received this morning from Senator Dodd. It reads as follows:

MAY 12, 1959.

MR. BERNARD FENSTERWALD, JR.,
Counsel, Senate Subcommittee on Constitutional Amendments,
Washington, D.C.

DEAR MR. FENSTERWALD: At the two meetings of the subcommittee today, there were several points with respect to Senate Joint Resolution 32, which were most troublesome to me. In an effort to clarify my own thinking and to bring out the points in the record, I asked a number of similar questions of almost every witness.

I hope to be able to attend every session of the subcommittee hearings on Senate Joint Resolution 32. However, as you know, my committee duties are such that this will probably be impossible. Therefore, I am enclosing a carbon

copy of the memorandum containing some of the questions which I have put to the various witnesses.

If I am unable to attend a session, and if you think asking these questions of a particular witness would help to clarify the record, and, further, if the chairman has no objections, I request that you ask them in my behalf.

Sincerely yours,

THOMAS J. DODD, *U.S. Senator.*

Senator KEFAUVER. I hope Senator Dodd can be at as many hearings as possible, but if not, then upon his request I will ask you, as counsel, to ask the questions that Senator Dodd is interested in.

Mr. FENSTERWALD. Thank you, Senator.

Our first witness this morning is Mr. Merwin K. Hart, president, National Economic Council, Inc.

Senator KEFAUVER. Mr. Hart, suppose you sit right there. That is fine, but wait one moment before you begin.

On the list of witnesses here is Senator John Stennis, who indicated yesterday that he would testify today. He told me later yesterday that, because of a conflict in engagements, he would not be able to be here this morning but that he would ask us to fit him in some later time in the scheduled hearings.

Our first witness is Mr. Merwin K. Hart, president, National Economic Council, New York City.

We are glad to have you here, Mr. Hart.

You have a statement?

Mr. HART. Yes, sir. I have a brief statement.

Senator KEFAUVER. We will ask you to proceed at this time.

STATEMENT OF MERWIN K. HART, PRESIDENT, NATIONAL ECONOMIC COUNCIL, INC., NEW YORK, N.Y.

Mr. HART. Mr. Chairman, the National Economic Council strongly supports Senate Joint Resolution 32, and urges this subcommittee to report it to the Senate, and hopes it will be adopted by the necessary two-thirds in both Houses of Congress.

Only a few years ago it would have seemed strange, indeed, if any Member of either House had thought it necessary to introduce such a resolution as this. For, during roughly a century and a half of our national history, all Americans believed that under the wording and spirit of the Constitution, the control of education was exclusively a matter for the States and localities. It was assumed that article X of the Bill of Rights, which reads as follows, meant just what it said:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

Certainly any power over education was never delegated to the Federal Government by the Constitution, nor prohibited by the Constitution of the United States. Education is in its very essence a State and local affair.

But while the American people apparently were taking for granted that their liberties would always be with them, cunning Socialist and Communist mischief-makers from other lands had infiltrated this country and, by the aid of certain of our intellectuals and many of our educational institutions, had undertaken to put their ideas into effect.

Unquestionably, these alien-minded individuals, with their Ameri-

can converts, were responsible for the integration decision of the Supreme Court of May 17, 1954. That decision did not even pretend to be on legal and constitutional grounds. One of the authorities most relied on was the Swedish socialist, Gunnar Myrdal, who, after a brief stay in this country, attacked the Constitution of the United States as "nearly a conspiracy against the common people." There is little doubt that the integration decision was an important part of the campaign of the Soviet leaders to conquer the world, especially the United States.

One Israel Cohen, a leading communist in England in 1912 wrote a book entitled "A Racial Program for the Twentieth Century." In that book he set forth the Communist policy. The following extract from this book was included on page 7633 of the Record as printed daily (p. 8559 of vol. 103, pt. 7 of the bound volumes) of the Congressional Record for June 7, 1957:

> We must realize that our party's most powerful weapon is racial tension. By propounding into the consciousness of the dark races that for centuries they have been oppressed by the whites, we can mould them to the program of the Communist Party.
>
> In America, we will aim for subtle victory. While inflaming the Negro minority against the whites, we will endeavour to instill in the whites a guilt complex for their exploitation of the Negroes. We will aid the Negroes to rise in prominence in every walk of life, in the professions and in the world of sports and entertainment.
>
> With this prestige the Negro will be able to intermarry with the whites and begin a process which will deliver America to our cause.

Since the integration Supreme Court decision of 1954, the Supreme Court, having assumed legislative power—if not the power to amend the Constitution itself—has extended its antisegregation policy to many other fields, including playgrounds, swimming pools, transportation, and so forth. But we, of course, are concerned here only with education.

Thus it would appear that communism is the author of the scheme underlying the integration decision whereby the Federal Government is taking away the control of our schools from the States and localities. An English Communist appears to have contributed the idea and a Swedish Socialist was, as it were, an important consultant.

Alien infiltration is the cause of the evil which the Talmadge resolution seeks to cure.

There are several reasons why the Talmadge resolution should be adopted:

1. Because, with respect to the schools, it would completely nullify the Communist grab for power by way of the Supreme Court through the assumption of control over our schools. For so long as our schools remain independent, and under State and local control, the ambitions of the Communists for conquest of the United States, would have a considerable setback;

2. Conditions vary in different parts of the country. From the American standpoint, though not from the Communist nor Socialist standpoint, what is taught in one section of the country would not necessarily be taught in the same way in another part of the country. Education is tied up in the minds of American citizens with the very heart of their liberties. If they lose control of their education, they will lose control of their children. And part of the very

lifeblood of successful Americans has been that, by and large, the children have had the benefit of parental care and discipline and the parents have had the general control over the schools in which their children are taught.

3. Concentration in the Federal Government of control over any public activity always costs more than when it is handled locally. As the powers and duties of Government increase arithmetically, the cost of them, and the number of personnel required tend to increase almost geometrically;

4. If this new rule established by the Supreme Court in 1954, by which the Court has undertaken to assume control of the schools, is to continue in effect, it will be just one more concentration of power in the Federal Government—one more Federal control. Furthermore, it will be just so much support for the current movement toward world government through world law. The State Department has said that there is now no difference between local and national issues.

The backers of world law and world government believe we should assign to the World Court and the United Nations the right to decide which questions are domestic and which international.

The Senate, in all probability, would never have ratified the charter of the United Nations had it not been for section 7 of article II of the charter, which says that:

> Nothing contained in the present charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state * * *.

Yet it is section 7 of article II that the world government people and the world law people wish to reverse.

If we Americans are to keep our liberties, we must preserve the distinction between local and national issues, and between national and international issues. For if we do not we will be helping along the movement to establish a world law, under which all our liberties are certain to disappear.

Hence, Senate Joint Resolution 32 is of vital importance, not only because of the single subject with which it deals, namely education; but because, if passed, it will be notice to the administration and the Supreme Court, as well as to other governments, that the people of the United States intend to remain free.

Naturally, every Communist- and Socialist-infiltrated organization in the United States—and that includes most of the means of communication: press, radio and TV—will oppose this resolution.

But in our opinion, this subcommittee has not had a more important measure before it in a long time.

Senator KEFAUVER. Mr. Hart, do you really want to suggest that most of the means of communication—press, radio and TV—are Communist and Socialist infiltrated?

Mr. HART. Yes. I would say that, Senator. I think we in New York feel that particularly.

Senator KEFAUVER. Well, I just want to register my dissent.

Mr. HART. I was told the other day, Senator, by a man who stands very high in this country, who was with the FBI many years, that there are about 30 newspapers in this country out of all that we have in this country—which I think is 1,200 or 1,400 daily newspapers—which are entirely independent, and the rest are more or less infil-

trated. Those not infiltrated would include the Manchester Leader, for instance.

Senator KEFAUVER. Mr. Hart, I think that is a very drastic statement to make. A great many of the newspapers and other media of communication have not been friendly toward me. Some of them have been friendly and some of them haven't; but I certainly think you are getting far afield when you suggest that our press, radio, TV, and communications are Communist and Socialist infiltrated. I think we are proud of our means of communication, proud of our press. We have a free press, and I think our various means of communication and our press have done the finest job in opposing communism and socialism and communistic and socialistic infiltration.

I regret to have any witness make that statement.

Mr. HART. I would be very glad to file a supplementary statement on that point, Senator. I mean later. I haven't got it here. But I could give you data which I——

Senator KEFAUVER. It is not germane, and I am not going to allow this subcommittee to be used for the purpose of defaming our means of communication, our press and radio and TV, in this fashion.

Mr. Hart, what is the National Economic Council?

Mr. HART. The National Economic Council is a membership corporation formed about 30 years ago and consisting of not over, I think, a couple of thousand members and having a paid circulation of its economic council letter of perhaps 7,000 or 8,000 as a minimum, rising to 30,000 or 40,000 on many issues of our semimonthly issue.

We are in favor of private enterprise and preserving American independence. I think that would sum it up.

Senator KEFAUVER. You are the president. Who are the other officers?

Mr. HART. We have a number of——

Senator KEFAUVER. Have you got a letterhead here?

Mr. HART. I don't think I have, Senator, no. But we have several vice presidents, including Vice Admiral Freeman, who is a retired vice admiral, and who has been with us some years; Lt. Gen. Pedro Del Valle, formerly of the Marines; and a number of civilians; one minister of the gospel out in Kentucky.

I will be glad to send you my letterhead and a folder describing our activities.

Senator KEFAUVER. All right, sir. I would like to see it. Now, what is the purpose of the National Economic Council?

Mr. HART. The purpose is to preserve the traditional American way of life, to preserve private enterprise and against socialism and communism.

Senator KEFAUVER. Are you a lawyer, Mr. Hart?

Mr. HART. I practiced many years ago, but I haven't for 30 years. I am a member of the bar still.

Senator KEFAUVER. Of New York?

Mr. HART. Of New York.

Senator KEFAUVER. All right.

Any questions, Mr. Fensterwald?

Mr. FENSTERWALD. I would like to ask just two questions which were raised by Senator Dodd; and I am asking them on his behalf rather than on my own, Senator.

Mr. Hart, do you consider the Brown decision as binding until reversed by the Supreme Court or superseded by a constitutional amendment?

Mr. HART. Well, I believe that a decision by the Supreme Court is the law of the case and not the law of the land. Nevertheless, I think it is built up by a great deal of the press that you were talking about, Senator, not to speak of the radio, too, as being the law of the land. I have seen a great deal of that in our New York Times and other newspapers; the Washington Post; and it seems——

Senator KEFAUVER. You are not inferring that the Washington Post and New York Times are among those Communist and Socialist dominated newspapers.

Mr. HART. I certainly think they are Communist infiltrated. Why, Senator, only——

Senator KEFAUVER. Well, Mr. Hart, I can't say how sorry I am that you have come here with that kind of statement. I must say it is repulsive to me. I think these newspapers and others are trying to do a good job in the public interest.

Mr. HART. I think many of them are. I think many of them would like to, but don't. Why Senator, the proceedings——

Senator KEFAUVER. Well, I just hate to cut you off, Mr. Hart, but I just don't want to hear any more testimony of that kind.

Mr. FENSTERWALD. Mr. Hart, you referred to the law of the land. I did not refer to that in my question. My question was whether you think that the Brown decision, until reversed by the Supreme Court or superseded by constitutional amendment, will be binding on all lower Federal courts and all State courts.

Mr. HART. I think it is very apt to be. I think many of the district and circuit judges would follow the Supreme Court even though that in our opinion is simply the law of the case and not the law of the land.

Mr. FENSTERWALD. As a lawyer, can you think of any grounds on which a lower Federal judge could refuse to follow the Supreme Court's decision under the same facts?

Mr. HART. There you are answering the question yourself, it seems to me, sir.

Mr. FENSTERWALD. My second question, which is on behalf of Senator Dodd and which he asked several witnesses, is if this amendment were adopted, would there be any requirement left in the Constitution that States or local communities would have to furnish equal facilities to different groups of citizens, and would it not be possible for States to have schools for white children and not Negro children, and vice versa? In other words, as Senator Dodd put it, wouldn't the Talmadge amendment, if adopted, carry us back not to 1954 or even to 1896, at the time of *Plessy* v. *Ferguson*, but rather to 1868 before passage of the 14th amendment?

Mr. HART. Summarize that question briefly, will you, please?

Mr. FENSTERWALD. Senator Dodd was of the opinion that, if this proposed amendment were adopted, it would exclude from the 14th amendment the operation of public schools. Therefore, there would be no requirement for the separate-but-equal doctrine; and it was his contention that the proposed amendment would take us back to the situation before passage of the 14th amendment, as far as operation of public schools is concerned.

Mr. HART. Well, I think with all the effects it would have that all matters pertaining to schools should be restored without any possibility of doubt to the States and the localities.

Mr. FENSTENWALD. In other words, you do not think that the 14th amendment should apply to public schools.

Mr. HART. I don't think it should; no, sir.

Senator KEFAUVER. All right. I think we have had enough. Anything else? Mr. Chumbris?

Mr. CHUMBRIS. Speaking on behalf of Senator Langer, Mr. Hart, do you believe that the Federal Government should in any instance contribute to the States for public schools?

Mr. HART. I don't see why it should. The money comes right from the same people.

Mr. CHUMBRIS. Would you go so far as to say that in federally impacted areas, where there are either major military installations or high concentrations of Federal employees which tax or place an undue burden on counties and States to construct schools, that the Federal Government should or should not contribute to the building of schools?

Mr. HART. That, sir, might be an exception because of the very nature of the case; but by and large, we think that the Federal Government should stay out of the furnishing of State aid for schools. It is just one more excuse to spend the taxpayers' money.

Mr. CHUMBRIS. Now, if S.J. Res. 32 were passed and made a part of the Constitution, what would be your view as to the effect that it would have for the Federal Government to contribute to these federally impacted or military areas?

Mr. HART. I should think that would be worked out as part of the military expense, but I don't see why because of that one exception the whole policy of leaving the schools to the States and localities should be violated.

Mr. CHUMBRIS. Do you think under our law today that the Federal Government is dominating the administration of the State schools?

Mr. HART. It certainly has, since May 17, 1954. It has had the most enormous influence just as was intended by the people who were, I believe, back of it.

Mr. CHUMBRIS. I have no further questions, Mr. Chairman.

Senator KEFAUVER. Thank you, Mr. Hart.

Mr. HART. Thank you, Mr. Chairman, and gentlemen.

Mr. FENSTERWALD. The next witness, Mr. Chairman, is Mr. William M. Beard, past commander in chief, Sons of Confederate Veterans, 66 Elm Street, Westfield, N.J.

Senator KEFAUVER. Mr. Beard, you have a lengthy statement here in which you have quite a number of quotations, and any of these quotations that you don't wish to read will be printed in the record.

Senator Talmadge recommended or suggested you, Mr. Hart, and a number of other proponents be invited to come here and testify. We have been pleased to invite all of the witnesses that Senator Talmadge has suggested, and you are one of them.

Let me extend a welcome to you, and tell you that we are glad to have you here.

Mr. BEARD. Thank you, Senator.

Mr. FENSTERWALD. Mr. Chairman, I suggested to Mr. Beard that, if he preferred, he could summarize his statement orally and that we would print the whole statement either at the beginning or the conclusion of his remarks, as he would desire.

Senator KEFAUVER. Do you want to do that?

Mr. BEARD. Yes, if it would please the Senator, I would like to do that.

Senator KEFAUVER. All right. The entire statement will be printed, and Mr. Beard will orally summarize it.

(The prepared statement of Mr. William A. Beard is as follows:)

STATEMENT IN SUPPORT OF PROPOSED CONSTITUTIONAL AMENDMENT TO VEST EXCLUSIVELY IN EACH STATE THE ADMINISTRATIVE CONTROL OF ANY PUBLIC SCHOOL, PUBLIC EDUCATIONAL INSTITUTION, OR PUBLIC EDUCATIONAL SYSTEM OPERATED BY SUCH STATE OR BY ANY POLITICAL OR OTHER SUBDIVISION THEREOF

Submitted by William M. Beard, past commander in chief, Sons of Confederate Veterans, Westfield, N.J.

Senators, I am appearing before this subcommittee as the representative of the Sons of Confederate Veterans, pursuant to a written authorization signed by T. W. Crigler, Jr., of Macon, Miss., commander in chief of the Sons of Confederate Veterans (a copy of which is hereto attached and made a part hereof).

The preamble of the constitution of the Sons of Confederate Veterans, adopted July 1, 1896, declares, inter alia:

"An unquestioned allegiance to the Constitution of the United States of America, largely written and expounded by southern men, the very Magna Charta of our liberties; a strict construction of all sections conferring power upon the Federal Government, and the implied and understood reservations to the States arising therefrom * * *."

Articles IX and X of the amendments to the Constitution read:

"ARTICLE IX

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

"ARTICLE X

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

(The first 10 amendments became effective November 3, 1781.)

Section 8 of article I of the U.S. Constitution enumerates the powers of the Congress. This section contains no grant of power to the Congress to control, regulate or determine the manner in which any public school, public educational institution, or public educational system may be operated.

The last paragraph of section 8, reads:

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department thereof."

This so-called grant of implied powers is not broad enough nor elastic enough to grant any power over any public school, public educational institution or public educational system operated by any State.

Therefore, the Congress has no power, express or implied, to regulate or control any public school, or public educational institution, or public educational system operated by a State.

There is grave concern that the American schools are moving toward a national system of examinations, administered by the Federal Government. Frederick M. Rauberger, commissioner of education of New Jersey, stated in Atlantic City on February 16, 1959, that a proposed $1,400,000 research project of the U.S. Office of Education "lets the camel's nose into the tent."

The U.S. Constitution was erected upon the fundamental principle that Government derives its just powers from "the consent of the governed." Therefore, a law written by agents of the people in contradiction to the real will of the people leads to disobedience, disregard, or repeal.

The issue of enforced integration in the schools in the several States has many phases, legal, moral, sociological, and political. Conformity by coercion is the device by which freedom has been destroyed and totalitarianism has been substituted. Conformity means that everybody must think alike, act alike, and obey the edicts of a central authority.

In 1781 the Thirteen Original States entered into a "confederation" and drew up articles, one of which read: "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction and right which is not by this confederation expressly delegated to the United States." The independent States were willing to join together as the "United States" and to give to the "Union" certain enumerated powers, but they reserved to themselves all other powers. They reserved the principle of "States' rights."

When the Revolutionary War ended, England and the United States signed a peace treaty, which began:

"His Brittanic Majesty acknowledges the said United States, viz: New Hampshire, Massachusetts' Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, to be free, sovereign, and independent States."

Therefore, England made peace, not with the "confederation," but with 18 independent States.

Our Founding Fathers realized that they could not apply a rule of conformity over the people of the several States. Therefore, they reserved to the States the right to solve their individual sociological problems, otherwise the Constitution could not have been ratified.

Education is another power reserved to the States. The maintenance of law and order has been primarily a State and city responsibility. Conformity cannot be enforced where the customs and morals of the people are in conflict with statutory law. The Government cannot legislate morals. This was demonstrated by our experience with the 18th amendment. When we interpose Federal authority, we disregard local self-government, thereby impairing the right of self-government. Today the Supreme Court is attempting to compel the minority in the South to conform to the supposed will of the majority of the North. Does the Court intend to strike down the principle of States rights altogether? The individual rights of association, the practice of religion, the right to educate our children in accordance with our local customs and traditions, the right of the minority to pursue its own religious or racial customs have been recognized as just and legal principles. Majority, as well as minority, groups have an equal right to freedom of association or nonassociation. Such association or nonassociation must be voluntary and not coerced.

In the October 3, 1958, issue of U.S. News & World Report, David Lawrence writes:

"To deplore the closing of public schools in Virginia and Arkansas and to say the consequences could be 'disastrous' is to say that the people of these two States cannot possibly achieve by private schools what they have hitherto achieved through public schools.

"Maybe the people of Virginia and Arkansas will not succeed in giving their children better schooling through private institutions, but at least they have the right to try. For there is no right on the part of the President or anyone else in the Federal Government to seek to control the educational processes of the several States. This is a matter which Congress again and again has said in its laws must remain 'forever' in the 'exclusive control' of the States. This same language was in the law recently passed by Congress admitting Alaska to the Union.

"Nor is the maintenance of public schools necessarily a State's legal obligation. Each State can, within its discretion, provide public schools or decide to aid private schools. This, too, has been upheld for many years by the Supreme Court."

Hon. M. T. Phelps, senior justice of the Arizona State Supreme Court, in commenting on the desegregation decision of 1954, *Brown* v. *Board of Education*, is reported as saying on page 1, the Arizona Republic, Phoenix, Ariz., September 19, 1957:

"It is the design and purpose of the (United States Supreme) Court to usurp the policymaking powers of the Nation. * * * By its own unconstitutional pronouncements, it would create an all-powerful centralized Government in Washington and the subsequent destruction of every vestige of States rights expressly and clearly reserved to the States under the 10th amendment of the Constitution.

Mr. Hart, do you consider the Brown decision as binding until reversed by the Supreme Court or superseded by a constitutional amendment?

Mr. HART. Well, I believe that a decision by the Supreme Court is the law of the case and not the law of the land. Nevertheless, I think it is built up by a great deal of the press that you were talking about, Senator, not to speak of the radio, too, as being the law of the land. I have seen a great deal of that in our New York Times and other newspapers; the Washington Post; and it seems——

Senator KEFAUVER. You are not inferring that the Washington Post and New York Times are among those Communist and Socialist dominated newspapers.

Mr. HART. I certainly think they are Communist infiltrated. Why, Senator, only——

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Mr. FENSTERWALD. Mr. Hart, you referred to the law of the land. I did not refer to that in my question. My question was whether you think that the Brown decision, until reversed by the Supreme Court or superseded by constitutional amendment, will be binding on all lower Federal courts and all State courts.

Mr. HART. I think it is very apt to be. I think many of the district and circuit judges would follow the Supreme Court even though that in our opinion is simply the law of the case and not the law of the land.

Mr. FENSTERWALD. As a lawyer, can you think of any grounds on which a lower Federal judge could refuse to follow the Supreme Court's decision under the same facts?

Mr. HART. There you are answering the question yourself, it seems to me, sir.

Mr. FENSTERWALD. My second question, which is on behalf of Senator Dodd and which he asked several witnesses, is if this amendment were adopted, would there be any requirement left in the Constitution that States or local communities would have to furnish equal facilities to different groups of citizens, and would it not be possible for States to have schools for white children and not Negro children, and vice versa? In other words, as Senator Dodd put it, wouldn't the Talmadge amendment, if adopted, carry us back not to 1954 or even to 1896, at the time of *Plessy* v. *Ferguson*, but rather to 1868 before passage of the 14th amendment?

Mr. HART. Summarize that question briefly, will you, please?

Mr. FENSTERWALD. Senator Dodd was of the opinion that, if this proposed amendment were adopted, it would exclude from the 14th amendment the operation of public schools. Therefore, there would be no requirement for the separate-but-equal doctrine; and it was his contention that the proposed amendment would take us back to the situation before passage of the 14th amendment, as far as operation of public schools is concerned.

Mr. HART. Well, I think with all the effects it would have that all matters pertaining to schools should be restored without any possibility of doubt to the States and the localities.

Mr. FENSTENWALD. In other words, you do not think that the 14th amendment should apply to public schools.

Mr. HART. I don't think it should; no, sir.

Senator KEFAUVER. All right. I think we have had enough. Anything else? Mr. Chumbris?

Mr. CHUMBRIS. Speaking on behalf of Senator Langer, Mr. Hart, do you believe that the Federal Government should in any instance contribute to the States for public schools?

Mr. HART. I don't see why it should. The money comes right from the same people.

Mr. CHUMBRIS. Would you go so far as to say that in federally impacted areas, where there are either major military installations or high concentrations of Federal employees which tax or place an undue burden on counties and States to construct schools, that the Federal Government should or should not contribute to the building of schools?

Mr. HART. That, sir, might be an exception because of the very nature of the case; but by and large, we think that the Federal Government should stay out of the furnishing of State aid for schools. It is just one more excuse to spend the taxpayers' money.

Mr. CHUMBRIS. Now, if S.J. Res. 32 were passed and made a part of the Constitution, what would be your view as to the effect that it would have for the Federal Government to contribute to these federally impacted or military areas?

Mr. HART. I should think that would be worked out as part of the military expense, but I don't see why because of that one exception the whole policy of leaving the schools to the States and localities should be violated.

Mr. CHUMBRIS. Do you think under our law today that the Federal Government is dominating the administration of the State schools?

Mr. HART. It certainly has, since May 17, 1954. It has had the most enormous influence just as was intended by the people who were, I believe, back of it.

Mr. CHUMBRIS. I have no further questions, Mr. Chairman.

Senator KEFAUVER. Thank you, Mr. Hart.

Mr. HART. Thank you, Mr. Chairman, and gentlemen.

Mr. FENSTERWALD. The next witness, Mr. Chairman, is Mr. William M. Beard, past commander in chief, Sons of Confederate Veterans, 66 Elm Street, Westfield, N.J.

Senator KEFAUVER. Mr. Beard, you have a lengthy statement here in which you have quite a number of quotations, and any of these quotations that you don't wish to read will be printed in the record.

Senator Talmadge recommended or suggested you, Mr. Hart, and a number of other proponents be invited to come here and testify. We have been pleased to invite all of the witnesses that Senator Talmadge has suggested, and you are one of them.

Let me extend a welcome to you, and tell you that we are glad to have you here.

Mr. BEARD. Thank you, Senator.

"* * * Regardless of what we, as individuals, may think about the justice or injustice of segregation, I assert without hesitation or reservation that the decision was not based upon logic or law.

"I further charge that the processes followed in reaching the decision's conclusion violate all procedure of due process known to American jurisprudence * * *. If the Court is much longer permitted to destroy States rights by process of attrition, as it has been doing, we will see Washington clothed with powers so strong that the people will be as helpless to curb its tyranny over them as they are in Russia today * * *."

The Honorable James F. Byrnes, former Justice of the Supreme Court of the United States, has written (U.S. News & World Report, May 18, 1956):

"Two years ago, on May 17, 1954, the Supreme Court of the United States reversed what had been the law of the land for 75 years and declared unconstitutional the laws of 17 States under which segregated public-school systems were established.

"The Court did not interpret the Constitution—the Court amended it.

"We have had a written Constitution. Under that Constitution the people of the United States have enjoyed great progress and freedom. The usurpation by the Court of the power to amend the Constitution and destroy State governments may impair our progress and take our freedom.

"An immediate consequence of the segregation decision is that much of the progress made in the last half century of steadily advancing racial amity has been undone. Confidence and trust have been supplanted by suspicion and distrust. The races are divided and the breach is widening. The truth is, there has not been such tension between the races in the South since the days of Reconstruction.

"One threatened consequence is the closing of public schools in many States of the South.

"A further consequence is the harm done to the entire country by the demonstrated willingness of the Supreme Court to disregard our written Constitution and its own decisions, invalidate the laws of States, and substitute for these a policy of its own, supported not by legal precedents but by the writings of sociologists.

"Today, this usurpation by the Court of the power of the States hurts the South. Tomorrow, it may hurt the North, East, and West. It may hurt you."

In the case of *Plessy* v. *Ferguson*, the U.S. Supreme Court, in construing a statute providing for segregation of the races on railroad trains, held that a statute providing for separate but equal facilities was not in violation of the 14th amendment to the Constitution. Thereafter, the Supreme Court, in several cases involving schools, upheld this doctrine. The Supreme Court, when it included such great and learned judges as Chief Justice Taft and Justices Holmes, Brandeis, and Stone, unanimously said that segregation in public schools had been "many times decided to be within the constitutional power of the State legislatures to settle without interference of the Federal courts under the Federal Constitution."

Hon. John J. Parker, Chief Judge of the Fourth Circuit, presided over the three-judge court when the suit from Clarendon County, S.C., was argued. This court held that, under the decisions of the U.S. Supreme Court from 1896 to that date, the segregation provisions of the Constitution and the statutes of South Carolina were not in violation of the 14th amendment.

An appeal was taken upon this decision to the U.S. Supreme Court. Instead of writing an opinion within a few months, the Supreme Court announced after many months that the cases should be reargued and that counsel should direct their arguments to certain questions, the first of which was, "What evidence is there that the Congress which submitted, and the State legislatures and conventions which ratified, the 14th amendment contemplated, or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?"

This question indicates that the majority of the Court was not then satisfied that Congress and the State legislatures did contemplate that the amendment would prohibit segregation in public schools.

The attorneys representing the parties and the attorneys general of many States having segregation statutes, filed briefs. The overwhelming preponderance of the legislative history demonstrated that the abolition of segregation in public schools was not contemplated by the framers of the 14th amendment, or by the States.

Section I of the 14th amendment, like section I of the Civil Rights Act of 1866, was meant to apply neither to jury service, nor suffrage, not antimiscegenation statutes, nor segregation. The disappointment which Thaddeus Stevens expressed in the House supports this conclusion.

The Supreme Court having theretofore interpreted the 14th amendment to apply to jury service and other matters not specifically delegated by the Constitution to the Federal Government, believed that the validity of those decisions would be questioned, unless the Court held the 14th amendment to apply to schools. But the Court overlooked a distinction: *Plessy* v. *Ferguson*, where the Supreme Court had held that State laws providing separate but equal school facilities did not deny a constitutional right. The control of schools had been proposed by some framers of the 14th amendment and rejected. There was no legislation by Congress prohibiting segregated schools.

Once the Supreme Court becomes committed to a policy of expanding the Constitution in order to justify previous expansions, there is no turning back. Each time the Court "reads into" the Constitution something which was never there, another segment of the people will be the victims.

The decisions of the Supreme Court must be accepted by the courts of the United States, but not necessarily by the court of public opinion.

One hundred representatives of the people of the U.S. Congress have issued a manifesto criticizing this decision. There is ample precedent for criticism by the people.

After the Dred Scott decision, Abraham Lincoln criticized the Court, declaring the decision erroneous and pledging the Republican Party to "do what we can to have it overruled." On March 9, 1937, President Franklin D. Roosevelt criticized the Supreme Court in these words: "The Court, in addition to the proper use of its judicial functions, has improperly set itself up as a third house of Congress—a superlegislature, as one of the Justices called it—reading into the Constitution words and implications which are not there."

Thirty-six State chief justices recently adopted a report criticizing the Supreme Court of the United States, declaring that the Court "has tended to adopt the role of policymaker without proper judicial restraint." Of the 48 State chief justices, 36 voted for the resolution, 8 voted against the resolution, 2 members abstained from voting and 4 were not present. I quote the following from this report:

"It is our earnest hope, which we respectfully express, that the great Court exercise to the full its power of judicial self-restraint by adhering firmly to its tremendous, strictly judicial powers and by eschewing, so far as possible, the exercise of essentially legislative powers when it is called upon to decide questions involving the validity of State action, whether it deems such action wise or unwise. The value of our system of federalism, and of local self-government in local matters which it embodies, should be kept firmly in mind, as we believe it was by those who framed our Constitution.

By its abandonment of the principle of stare decisis, the Supreme Court since 1932 has overruled 36 cases of its own body of case law. That is 7 more than the 29 previous decisions of the Supreme Court overruled in the 142 years from 1789 to 1932.

We have seen the tragic results of integration in this city. Between 60 percent and 70 percent of the pupils in the public schools of the Capital of the Nation are Negroes. There has been an exodus of white families from Washington into Virginia. Many families, at great financial hardship, have placed their children in private schools.

Integration poses many problems, but the fundamental problem is the determination of those who lead the fight for integration is to break down the social barriers in childhood and during the period of adolescence and ultimately bring about the intermarriage of the races. Because the white people of the South are unalterably opposed to such intermarriage, they are unalterably opposed to abolishing segregation in the schools.

Disraeli wrote, "No man will treat with indifference the principle of race. It is the key to history."

Today in 23 of the States, intermarriage of the races is prohibited by law. These laws reflect the fear of mongrelization of the white race.

Abraham Lincoln, who was certainly not a racist, said:

"I will say, then, that I am not, nor ever have been in favor of bringing about in any way the social and political equality of the white and black races; that I am not, nor ever have been, in favor of making voters or jurors of Negroes,

nor of qualifying them to hold office, nor to intermarry with white people, and I will say in addition to this that there is a physical difference between the white and black races which I believe will forever forbid the two races living together on terms of social and political equality, and inasmuch as they cannot so live, while they do remain together there must be the position of superior and inferior, and I, as much as any other man, am in favor of having the superior position assigned to the white race" (pp. 145–146, vol. 3, Collected Works of Abraham Lincoln. Roy P. Basler, Rutgers Univ. Press, 1953).

The children of the South are entitled to a public school education in schools established, financed, and operated by local people, who alone, and not the Federal Government or any division or agency thereof, shall determine in what manner the schools attended by their children shall be administered.

The principle of local self-government—local self-determination—is the bedrock of American liberty. The principle of local self-government is the greatest contribution of the Anglo-Saxon race.

I quote from the National Defense Education Act passed by the 2d session of the 85th Congress.

"The Congress reaffirms the principle and declares that the States and local communities have and must retain control over and primary responsibility for public education."

Congress provided in 6(j) Alaska Statehood Act:

"The schools and colleges provided for in this act shall forever remain under the exclusive control of the State, or its governmental subdivisions * * *."

If Alaska, a new State, is entitled to this right, certainly all of the States in the Union, North and South, East and West, are entitled to the same right.

The Supreme Court has ignored the principle that education is one of the powers reserved to the States. It has seen fit to desegregate the public schools of the South by holding that the 14th amendment abolished segregation in the public schools.

The dubious origin of the 14th amendment needs to be studied to be understood, particularly since it is being used by the Supreme Court as an implement for the invasion of areas formerly reserved to State regulation, or to individual or group action, and for breaking down established systems of racial segregation and setting up compulsory racial interassociation—in effect, compulsory racial integration. The "equal protection of the laws" clause and the "privileges or immunities" clause of the 14th amendment are those most frequently invoked to strike down segregation statutes.

The part of article V of the U.S. Constitution which set forth the procedure for amending the Constitution reads as follows:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution * * * which * * * shall be valid, to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States."

Two steps in the amending process are necessary: (1) Submission by the Congress; (2) ratification by the legislatures of three-fourths of the States. When article V in the Federal Constitution was being debated, Alexander Hamilton, in arguing in favor of giving this power of initiating an amendment proposed in Congress, said, "There could be no danger in giving this power, as the people would finally decide in the case."

Contrast Hamilton's concept with the action of a "rump Congress" in 1867 and 1868, when it arrogated to itself the power to force ratification of a rejected amendment, through coercing ratifications by several of the rejecting States.

The 14th amendment was submitted by a two-thirds vote of the quorum present in each House of Congress, which was a "rump Congress." Under the constitutional provisions that, "Each House shall be the judge of the elections, returns and qualifications of its own members * * *", each House had excluded all persons appearing with credentials as Senators or Representatives from the 10 Southern States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas and Texas. Had these 10 Southern States not been summarily denied their constitutional rights of representation in Congress through the ruthless use of the power of each House to pass on the election and qualifications of its Members, this amendment proposal would never have been submitted. It would have been impossible to secure a two-thirds vote for the submission of the proposed 14th amendment, particularly in the Senate if the excluded members had been permitted to enter and vote.

When the 14th amendment was submitted, these 10 Southern States which had been excluded from representation in Congress had existing governments and legislatures. Congress had sought to avoid extending any recognition to these existing State governments, and the legality of these governments, in what the radical majority in Congress termed the Rebel States, was disputed in some quarters. However, in practically all of these 10 States these governments were the only governments then in existence and these legislatures being the only legislatures then existing in these States, were in June 1866 the only legislatures in these States to which the 14th amendment could be then submitted "to the legislatures of the several States."

These 10 State governments had received presidential recognition and through their legislators they had participated actively in the then recent ratification and adoption of the 13th amendment abolishing slavery.

When the proposed 14th amendment was submitted to the legislatures of the several States, it needed to have ratification by 28 States, being three-fourths of the 37 States. It was never ratified by California. It was rejected by the three border States of Kentucky, Delaware, and Maryland. It was also rejected during the latter part of 1866 and the early part of 1867 by the legislatures of the 10 Southern States, including Louisiana, whose Senators and Representatives had been excluded from seats in Congress. Ratification of the 14th amendment was, therefore, impossible unless and until some of these rejections were reversed. With 37 States in all, 10 rejections were sufficient to prevent the adoption of the proposed amendment. The 13 rejections, by the 10 Southern States and 3 border States, were more than sufficient to block ratification, even if all other States finally ratified.

The Louisiana Legislature, which rejected the 14th amendment early in 1867, had been elected under the Louisiana constitution of 1864 and functioned under this constitution. This constitution had been adopted by a convention held in New Orleans under the auspices of the Federal authorities acting largely on suggestions and directions from President Lincoln. It was clearly a reestablishment and continuation of the Louisiana State government as it had existed before secession. This Louisiana Legislature, by Act 4 of 1867, adopted a joint resolution declaring "that the State of Louisiana refuses to accede to the amendment of the Constitution of the United States proposed as article XIV."

The radicals in the Congress had a majority by over a two-thirds vote, from which all representation of the 10 Southern States was excluded. They passed the Reconstruction Act of March 2, 1867. One of the major objectives of this act was the attainment of ultimate ratification of the 14th amendment through compelling and coercing ratification by the 10 Southern States which had rejected it. The act referred to the 10 Southern States as Rebel States. It recited that "No legal State government" existed in these States. It placed these States under military rule. Louisiana and Texas were grouped together as the Fifth Military District and placed under the domination of an Army officer appointed by the President. All civilian authorities were placed under the control of the military government.

This act, as supplemented, completely deprived these 10 States of all their powers of government and autonomy until such time as Congress should approve the form of a reorganized State government conforming to the specifications set forth in the act and should have recognized the States as again entitled to representation in Congress. It further provided that each excluded State must ratify the 14th amendment in order to again enjoy the status and rights of a State, including representation in Congress. Senator Doolittle, of Wisconsin, a conservative Republican during the floor debate on the bill, said: "My friends, I shall say what has been said all around me, what is said every day—the people of the South have rejected the constitutional amendment, and therefore, we will march upon them and force them to adopt it at the point of the bayonet, and establish military power over them until they do adopt it."

The Founding Fathers of our Constitution never contemplated or understood that ratification of a proposed constitutional amendment by a State could lawfully be compelled at the point of a bayonet and subjecting all aspects of civil life in a recalcitrant State to continued military rule until the State recanted and ratified the amendment under the duress of continued and compelling force. President Johnson vetoed the Reconstruction Act, denouncing it as a "bill of attainder against 9 million people at once." The act was promptly passed over the President's veto by the required two-thirds majority in each

House. Military rule took over in 10 Southern States to initiate the process of forcing a subjugated people to an ultimate acceptance of the 14th amendment.

Relief from the oppressive and unconstitutional features of the Reconstruction Act was sought in vain in the courts. Three times the Supreme Court found some reason for not deciding these constitutional issues. The Supreme Court at that time failed in these cases to measure up to the standard of the judiciary in a constitutional democracy. If the Reconstruction Act was unconstitutional, the people oppressed by it were entitled to protection by the judiciary against such unconstitutional oppression.

In *Mississippi v. Johnston* (4 Wall. 475), and in *Georgia* v. *Standard* (6 Wall. 50), and in *ex parte McCardle* (6 Wall. 318), the Supreme Court permitted Congress to evade a judicial determination of the constitutionality of the Reconstruction Act. As a result of these three decisions, enforcement of the Reconstruction Act against the Southern States, helpless to resist military rule without the aid of the judiciary, continued. Puppet governments were founded in these various States under military auspices. New State constitutions were adopted by legislators composed of freed Negroes, scalawags, and northern carpetbaggers, conforming to the requirements of Congress. One by one these puppet State governments ratified the 14th amendment, which their more independent and legal predecessors had rejected. In July 1868 the ratifications of this amendment by the puppet governments of 7 of the 10 Southern States, including Louisiana, gave more than the required ratification by three-fourths of the States and resulted in a joint resolution adopted by Congress and a promulgation by the Secretary of State declaring the 14th amendment ratified and in force.

In *Georgia* v. *Stanton* (6 Wall. 50), the Supreme Court declined to entertain a suit attacking the constitutionality of the Reconstruction Act on the ground that the issues raised were political and not justiciable.

Ratification in the Southern States came finally as a coerced result through the legislators of the puppet government created by the Reconstruction Act, after rejection of the amendment by the prior State legislatures.

If plain coercion under the Reconstruction Act be not regarded as nullifying the ratification votes of the Southern States recorded by puppet legislators obeying the orders of their masters, these puppet legislators have no power to speak on matters of legislative intent ex post facto for the States which they represented in voting for ratification. These States, as soon as they were free of Federal coercion, repudiated and disestablished these puppet governments and all that went with them.

The question arises—upon analysis of the provisions of article V and a study of the history of the evolvement of this article in the Federal Constitution of 1787—whether these coerced ratifications should be decreed null and void as the product of a usurpative invasion by Congress into an area, the ratification or rejection process, from which it is excluded by article V. To permit Congress to have a decisive and controlling part in the final decision on ratification or rejection of a proposed constitutional amendment would constitute a clear disregard of the plain intent of the Founding Fathers concerning the meaning and effect of article V. Congressional coercion intruding into and upon the ratification process is contrary to the understanding between Madison and Hamilton when, following Hamilton's frank statement that the power of final decision in an amendment proposal should be vested in the people, these two great statesmen cooperated in setting up the amendment procedure.

It may be contended that after a lapse of more than 80 years it is too late to question the constitutionality or validity of the coerced ratifications of the 14th amendment, even on constitutional and serious grounds. The answer is that there is no statute of limitations that will cure a gross violation of the amendment procedure laid down by article V of the Constitution. Precedents are not lacking for the successful assertion of constitutional procedures which have been flouted or ignored over long periods of time. In *Erie Railroad Co.* v. *Tompkins*, the Court on a constitutional point reversed its jurisprudence of more than 90 years' standing. The Court held a doctrine involving statutory construction would not be reexamined and upset after that lapse of time, but that the true doctrine on the constitutional point, once resolved, must be given effect, regardless of the lapse of time.

This principle should apply with respect to the 14th amendment. If the coerced and enforced ratifications of the 14th amendment by the Southern

States in 1868, compelled by congressional duress, constituted an infraction of the amendment procedure ordained by article V of the Constitution, these enforced ratifications are just as violative of the provisions of article V in 1954 as they were in 1868.

Article V of the Constitution was violated and flouted by the 1868 coerced ratifications of the 14th amendment, and the only conclusion which can be drawn from the coerced ratifications of the 14th amendment is that the 14th amendment was never legally adopted.

"The Present South," at page 277, 1904, written by E. G. Murphy, of Montgomery, Ala., contains the following paragraph:

"* * * the South in establishing the dogma of race integrity has done so, not in order to enforce a policy of degradation, but simply to express her own faith in a policy of separation. Her desire is not to condemn the Negro forever to a lower place but to accord him another place. She believes that where two great racial masses, so widely divergent in history and character, are involved in so much of local and industrial contact, a clear demarcation of racial life is in the interest of intelligent cooperation, and—in spite of occasional hardships—is upon the whole conservative of the happiness of both."

The Supreme Court decision, in opening the way for legal compulsory integration when Negroes apply for admission to white schools, arrested the real progress which had been made in all of the Southern States in the gradual elimination of any forms of legal compulsory separation. The intention of a legislative body is the controlling principle in the interpretation of statutory law. It has been clearly shown that the Congress which proposed the 14th amendment operated segregated schools. Therefore, the Supreme Court has held, again and again, that the "separate but equal doctrine" is not, per se, a violation of the intent of the 14th amendment. The operation of the public school system by the various States, according to varying conditions, is essentially a legislative matter, and the power to operate such a school system was never delegated to the Federal Government by the States.

The Supreme Court of the United States is supreme only on Federal questions; State courts are supreme on those powers which were reserved to the States; and neither the State nor the Federal courts have the power to legislate.

There is little doubt that the Supreme Court's decision in the segregation cases has set back the cause of the Negro in the South by more than a generation. The Negro may, through the decision of the Supreme Court, force his way into the white schools, but he will not force his way into white hearts, nor earn the respect he seeks. What the evolution of race relations was slowly and wisely achieving has been arrested by the revolutionary decision of the Supreme Court.

Since the Supreme Court has ignored the 10th amendment, and since the 14th amendment, upon which they have based their decision in the segregation cases is of the most doubtful origin, it follows that the control of schools, regardless of the 14th amendment, should be reserved to the States.

I, therefore, submit that the only satisfactory solution of the problems posed by the desegregation cases is the adoption of the proposed amendment to the Constitution of the United States, which reads: "Administrative control of any public school, public educational institution, or public educational system operated by any State or by any political or other subdivision thereof, shall be vested exclusively in such State and subdivision and nothing contained in this Constitution shall be construed to deny to the residents thereof the right to determine for themselves the manner in which any such school, institution, or system is administered by such State and subdivision."

I respectfully request and strongly urge the adoption of this amendment, which will end the "second tragic era" in the South.

Respectfully submitted.

ORAL STATEMENT OF WILLIAM A. BEARD, PAST COMMANDER IN CHIEF, SONS OF CONFEDERATE VETERANS, WESTFIELD, N.J.

Mr. BEARD. Thank you. I am appearing before this subcommittee as the representative of the Sons of Confederate Veterans, pursuant to a written authorization signed by Tom White Crigler, who is the national commander in chief of the organization.

The preamble——

Senator KEFAUVER. That is T. W. Crigler, Jr., commander in chief, Sons of Confederate Veterans. He lives at Macon, Miss.?

Mr. BEARD. Macon, Miss.

Senator KEFAUVER. All right, sir.

Mr. BEARD. The preamble of the constitution of the Sons of Confederate Veterans, which was adopted on July 1, 1896, declares, among other things:

> An unquestioned allegiance to the Constitution of the United States of America, largely written and expounded by southern men, the very Magna Charta of our liberties; a strict construction of all sections conferring power upon the Federal Government, and the implied and understood reservations to the States arising therefrom * * *

Article IX of the amendments to the U.S. Constitution reads:

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

And, then, the 10th amendment, reads:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Congress has no power, express or implied, to regulate any public school, any public educational system, or any educational institution. That power under the Constitution was reserved to the States under the doctrine of the reserved powers.

Now, our Constitution was erected upon the fundamental principle that government derives its just powers from the consent of the governed. Therefore, any law written by agents of the people in contradiction to the real will leads to disobedience, disregard, or repeal.

The issue of enforced integration in the schools in the several States has many phases. It has legal, moral, sociological, and political phases. Conformity is the device that has been used in all totalitarian countries by which freedom has been destroyed. Conformity means that everybody must think alike, act alike, and obey the edict of central authority.

When the Articles of Confederation were adopted in 1781, each State retained its sovereignty, its freedom, and its independence, and every power, jurisdiction, and right which was not expressly conferred upon the United States or upon the Congress. When the Revolutionary War ended and King George III made a treaty of peace with the United States, he made it with the United States and then there was spelled out in that treaty the individual 13 States, which indicates that they were 13 independent States.

Our Founding Fathers realized that they could not apply a rule of conformity over these 13 States, that each State had its own particular and peculiar customs, and therefore these reserved powers were reserved to the States, and the Constitution could never have been adopted had it not been for these powers being reserved to the States, all powers except those expressly granted to the Federal Government or implied to the Federal Government under section 8, that last paragraph.

The individual rights of association, practice of religion, and the right to educate our children in accordance with local customs and

traditions, the right of the minority to pursue its own religious and its own racial customs, have always been recognized as just and legal principles. Majority as well as minority groups have an equal right to freedom of association or nonassociation, and such association or nonassociation must be voluntary and not coerced.

Mr. David Lawrence wrote in the October 3, 1958, issue of U.S. News & World Report that Congress had again and again said that the States must have exclusive control over the educational processes in the States.

And Hon. M. T. Phelps, senior justice of the Arizona State Supreme Court, in commenting on the desegregation decision of the Supreme Court, say that regardless of what we as individuals may think about the justice or injustice of segregation—

I assert without hesitation or reservation that the decision was not based upon logic or law.

And Hon. James F. Byrnes, who was a former Justice of the Supreme Court of the United States, has written—I don't want to quote all of this, but—

Two years ago, on May 17, 1954, the Supreme Court of the United States reversed what had been the law of the land for 75 years and declared unconstitutional the laws of 17 States under which segregated public-school systems were established.

Justice Byrnes said that the Court did not interpret the law; the Court amended it.

Senator KEFAUVER. You mean the Constitution.

Mr. BEARD. Yes, sir; the Constitution.

And we have this written Constitution, and under this Constitution we have enjoyed great progress and freedom, and he says the usurpation by the Court of the power to amend the Constitution and destroy State governments may impair our progress and take our freedom.

Now, he makes a very valuable point, that the immediate consequence of this segregation decision was that much of the progress that has been made in the last half century of steadily advancing racial amity has been undone, and that there is more friction today than ever before.

And I would like to state here that I am just as much interested in seeing that the public schools are operated on a separate-but-equal basis for both white and colored children, and I am very much concerned over conditions now existing in the South, and their disastrous effects not only upon the white children but upon the colored children as well.

Now, in this case of *Plessy* v. *Ferguson*, supra, the U.S. Supreme Court in construing a statute providing for the segregation of the races on railroad trains, held that a statute providing for separate but equal facilities was not in violation of the 14th amendment of the Constitution, and thereafter the Supreme Court in several cases involving education upheld this doctrine.

When the Supreme Court included Chief Justice Taft, Justices Holmes, Brandeis, and Stone, they unanimously said that segregation in the public schools had many times been decided to be within the constitutional power of the State legislatures to settle without any interference of the Federal court.

Hon. John J. Parker, who was chief judge of the Fourth Circuit, presided over the three-judge court when the suit from Clarendon County, S.C., was argued, and that court held under the decisions of the Supreme Court from 1896 to date that the segregation provisions of the Constitution and the statutes of South Carolina were not in violation of the 14th amendment, and when the appeal was taken from the decision of this three-judge court to the U.S. Supreme Court, the Justices posed this question, among others:

What evidence is there that the Congress which submitted, and the State legislatures and conventions which ratified, the 14th amendment contemplated, or did not contemplate, understood or did not standstand, that it would abolish segregation in public schools?

The Supreme Court asked for briefs, not only from the counsel but from other interested parties who appeared as amici curiae, and when the attorneys who represented these parties and the attorneys general of the States filed their briefs, they demonstrated by overwhelming preponderance of the legislative history that the abolition of segregation in the public schools was not contemplated by the framers of the 14th amendment. In fact, those framers permitted segregation to exist here in Washington.

The Supreme Court has interpreted the 14th amendment to apply to jury service and other matters not specially delegated by the Constitution to the Federal Government. But *Plessy* v. *Ferguson* laid down a different doctrine with respect to the schools. Once the Supreme Court becomes committed to a policy of expanding the Constitution in order to justify previous expansions, there is no turning back. Each time the Court reads into the Constitution something that was never there, another segment of the people will be the victims.

Now, the decisions of the Supreme Court must be accepted by the courts of the United States, but they are not necessarily accepted by the court of public opinion. The congressional manifesto that was signed by the 100 Members of Congress some time ago was something that some regarded as revolutionary, but there was ample precedent for such criticism.

After the Dred Scott decision in 1857, Abraham Lincoln criticized the decision of the Supreme Court. He said it was erroneous and pledged the Republican Party to do what they could to have it overruled.

And President Franklin D. Roosevelt in 1937 said, in criticizing the Supreme Court:

The Court, in addition to the proper use of its judicial functions, has improperly set itself up as a third house of Congress—a superlegislature, as one of the Justices called it—reading into the Constitution words and implications which are not there.

And then we are familiar with the action taken by 36 State chief justices in their report that criticized the Supreme Court in not exercising sufficient judicial restraint. By its abandoning of the principle of standing by the decision, the Supreme Court since 1932 has overruled 36 cases of its own body of case law. That is 7 more than the 29 previous decisions of the Supreme Court overruled in the 149 years from 1789 to 1932.

We have seen the tragic results of integration in this city, with 60 to 70 percent of the pupils in the public schools being Negroes. The

white families have made an exodus from Washington and have settled in Virginia and Maryland. Many families, although not able to do so, have placed their children in private schools.

Integration poses many problems, but the fundamental problem is the determination of those who lead the fight for integration to break down the social barriers in childhood and during the period of adolescence and ultimately bring about the intermarriage of the races. Because the white people of the South are unalterably opposed to such intermarriage, they are unalterably opposed to abolishing segregation in the schools.

Disraeli wrote:

> No man will treat with indifference the principle of race. It is the key to history.

Today in 23 States, intermarriage of the races is prohibited by law. Here is a quotation from Abraham Lincoln, who was certainly not a racist, and that is probably more extreme than most of us would quote today:

> I will say, then, that I am not, nor ever have been in favor of bringing about in any way the social and political equality of the white and black races; that I am not, nor ever have been, in favor of making voters or jurors of Negroes, nor of qualifying them to hold office, nor to intermarry with white people, and I will say in addition to this that there is a physical difference between the white and black races which I believe will forever forbid the two races living together on terms of social and political equality, and inasmuch as they cannot so live, while they do remain together there must be the position of superior and inferior, and I, as much as any other man, am in favor of having the superior position assigned to the white race (pp. 145–146 vol. 3, Collected Works of Abraham Lincoln. Roy P. Basler, Rutgers University Press, 1953).

The children of the South are entitled to a public school education in schools established, financed, and operated by local people who alone, and not the Federal Government or any division or agency thereof, shall determine in what manner the schools attended by their children shall be administered. The principle of local self-government, local self-determination, is the bedrock of American liberty, and the principle of local self-government is the greatest contribution that the Anglo-Saxon race has made.

The National Defense Act provided and Congress reaffirms the principle and declares that the States and local communities have and must retain control over and the primary responsibility for public education.

Title 48 of the Alaska Statehood Act says:

> The schools and colleges provided for in this act shall forever remain under the exclusive control of the State, or its governmental subdivisions * * *.

That is section 6(j).

Now, the Supreme Court has ignored the principle that education is one of the powers reserved to the States. It has seen fit to desegregate the public schools of the South by holding that the 14th amendment abolished segregation in the public schools.

A large part of my statement deals with the dubious origin of the 14th amendment. It has been used by the Supreme Court as an implement for the invasion of areas formerly reserved to State regulation or to individual or group action and for breaking down established systems of racial segregation.

Article V provides how the Constitution may be amended, that whenever two-thirds of both Houses deem it necessary, the amendment may originate in the Congress, but it must be ratified by the legislatures of three-fourths of the States.

During the congressional debates on the ratification of the Constitution, Hamilton and Madison locked horns on this very point. Madison did not like the provision in the Constitution of having amendments originate in the Congress, but Hamilton said the main part of it is that the amendments must be ratified by the people. Now, then, if we contrast Hamilton's concept with the action of the rump Congress in 1867–68, when this Congress arrogated to itself the power to enforce ratification of rejected amendments through coercion, coercing the ratification by several of the seceding States, we know that the proposal submitting the 14th amendment to the States was by a rump Congress which excluded the representatives from 10 of the former Confederate States, and they used that power in the Constitution which says each House shall be the judge of the elections, returns, and qualifications of its Members, and all persons who had credentials as Senators or Representatives from these Southern States were excluded.

When this 14th amendment was submitted, these 10 Southern States had been excluded, and yet there were in these 10 Southern State legislatures and governments that had been recognized by the President, and the legislatures of these 10 States had ratified the 13th amendment which abolished slavery. But the radical group in Congress in 1867 knew that the only way they could get ratification of the 14th amendment would be through drastic methods, and they therefore declared that these 10 Southern States were nothing more than conquered provinces and that their existing governments were of no force and effect, and they ordered the reelection of members of the legislature in each of these 10 States after these States had been divided into military governments and all of the former Confederate soldiers were disqualified. They had no right to vote, and the only people who voted were the Negroes who had been freed, the southern scalawags and the northern carpetbaggers, and when they got a puppet legislature elected, then the 14th amendment was ratified.

Now, that gives the history of how the 14th amendment was adopted, and it is certainly, to say the least, of very dubious origin.

In *Mississippi* v. *Johnson* and *Georgia* v. *Stanton* and in *Ex parte McCardle*, the Supreme Court permitted the Congress to evade a judicial determination of the constitutionality of the Reconstruction Act. They said that the issues raised were political and not justiciable.

Now, if plain coercion under the Reconstruction Act be not regarded as nullifying the ratification votes of the Southern States recorded by puppet legislators obeying the orders of their masters, these puppet legislators had no power to speak on matters of legislative intent ex post facto, for the States they represented in voting for ratification. And these 10 States, as soon as they were free of Federal coercion, repudiated and disestablished these puppet governments and all that went with them.

Now, it may be contended—the question arises, then, upon analysis of the provision of article V——

Senator KEFAUVER. Is it your position that the 14th amendment was never legally adopted?

Mr. BEARD. I do not believe it was, Senator. That is my position on it.

Now, it may be argued that time—it may be contended that after a lapse of more than 80 years it is too late to question the constitutionality or the validity of the coerced ratifications, and they were coerced, of the 14th amendment even on constitutional and serious grounds. But there is no statute of limitations that will cure it. It is a gross violation of the amendment procedure laid down by the fifth article of the Constitution. It was ratified in violation of article V.

Now——

Senator KEFAUVER. On that matter of the legality of the 14th amendment, I have here page 6825 of the Congressional Record of May 7, 1959, which sets forth action by the General Assembly of the State of Maryland.

Mr. BEARD. Yes, sir. I am interested in that. That is the first time it was adopted.

Senator KEFAUVER. It says that when the 14th amendment was presented on March 23, 1868, the State of Maryland rejected the proposed 14th amendment. And it has not since ratified it until this year. I think we will put this act of ratification in the record at this point. It is of interest.

(The document referred to is as follows:)

RESOLUTION OF RATIFICATION OF ARTICLE 14 OF THE CONSTITUTION BY GENERAL ASSEMBLY OF MARYLAND

The President pro tempore laid before the Senate a resolution of the General Assembly of the State of Maryland, which was referred to the Committee on the Judiciary, as follows:

THE STATE OF MARYLAND,
EXECUTIVE DEPARTMENT.

I, J. Millard Tawes, Governor of the State of Maryland, and having control of the great seal thereof, do hereby certify, that the attached is a true and correct copy of Senate Joint Resolution 15, now known as Resolution 27, of the acts of the General Assembly of Maryland of 1959.

In testimony whereof, I have hereunto set my hand and have caused to be hereto affixed the great seal of the State of Maryland at Annapolis, Md., this 5th day of May, in the year 1959.

By the Governor:

J. MILLARD TAWES.
THOMAS B. FINAN,
Secretary of State.

RESOLUTION 27, ACTS OF 1959

Senate joint resolution ratifying article 14 of the Constitution of the United States

Whereas the 14th amendment to the Constitution of the United States was proposed to the legislatures of the States of the United States by the 39th Congress on the 16th day of June 1866; and

Whereas on the 21st day of July 1868 the Congress adopted and transmitted to the Department of State of the United States, a concurrent resolution declaring that the requisite number of three-fourths of the States of the Union had ratified the said 14th amendment to the Constitution of the United States and that the said 14th amendment was thereby declared to be a part of the Constitution of the United States; and

Whereas the State of Maryland, on March 23, 1867, rejected the proposed 14th amendment to the Constitution of the United States and has not since ratified the same; and

Whereas the said 14th amendment has long been a vital part of the Constitution of the United States and should be ratified by the State of Maryland to

show the concurrence of this great State with the principles therein enunciated; and

Whereas the said 14th amendment to the Constitution of the United States provides as follows, viz:

"SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"SEC. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being 21 years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens 21 years of age in such State.

"SEC. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a Member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

"SEC. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

"SEC. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article": Now, therefore, be it

Resolved by the General Assembly of Maryland, That the foregoing amendment to the Constitution of the United States be and the same is hereby ratified to all intents and purposes as a part of the Constitution of the United States; and be it further

Resolved, That the Governor of the State of Maryland be and he is hereby requested to forward to the Secretary of State of the United States, to the presiding officer of the Senate of the United States and to the Speaker of the House of Representatives of the United States, authentic copies of this resolution under the great seal of the State of Maryland.

Senator KEFAUVER. Has that been done by any other State?

Mr. BEARD. Not that I know of, Senator. I think Maryland is the only one. That was within the last month, I think, that this went through.

Senator KEFAUVER. Yes. This was very recent. In the month of May. The 5th day of May 1959.

Mr. BEARD. Well I could say right here, of course, Maryland furnished more than 20,000 troops to the Confederacy and they would undoubtedly have passed an ordinance of secession when Lincoln locked up the legislature, so they never could pass it. There were more people who went to jail in Maryland not knowing why they went to jail than in any other State of the Union.

Senator KEFAUVER. What do you think about this action of the Maryland Legislature?

Mr. BEARD. I think they have taken that action to more or less be in line with the other States, Senator.

Senator KEFAUVER. So far as I know, this is the first time I have ever known of anything like that.

Mr. BEARD. I haven't known it before, but in one of the best histories of the Supreme Court of the United States—it is in two volumes; I forget the name of the writer—he makes the statement that in construing the 14th amendment immediately after its adoption, the Supreme Court justices at that time construed it in a very narrow way because they were somewhat concerned about its dubious origin.

The Supreme Court in opening the way for legal compulsory integration when Negroes apply for admission to white schools arrested the real progress which had been made in all of the Southern States in the gradual elimination of any forms of legal compulsory separation. The intention of a legislative body is the controlling principle in the interpretation of statutory law. It has been clearly shown that the Congress which proposed the 14th amendment operated segregated schools. Therefore, the Supreme Court has held, again and again, that the "separate but equal doctrine" is not, per se, a violation of the intent of the 14th amendment. And the operation of the public school system by the various States, according to varying conditions, is a legislative matter and the power to operate these schools was never delegated.

Now, the Supreme Court of the United States is supreme in Federal questions. State courts are supreme on those powers which were reserved to the States. The Negro may, through the decision of the Supreme Court, force his way into the white schools but he will not force his way into the white hearts nor earn the respect he seeks. What the evolution of race relations was slowly and wisely achieving has been arrested by the revolutionary decision of the Supreme Court. Since the Supreme Court has ignored the 10th amendment, and since the 14th amendment, upon which they have based their decision in segregation cases, is of the most doubtful origin, it follows that the control of schools, regardless of the 14th amendment, should be reserved to the States. And I therefore submit that the only satisfactory solution of the problems posed by the desegregation cases is the adoption of the proposed amendment to the Constitution of the United States which reads:

Administrative control of any public school, public educational institution, or public educational system operated by any State or by any political or other subdivision thereof, shall be vested exclusively in such State and subdivision and nothing contained in this Constitution shall be construed to deny to the residents thereof the right to determine for themselves the manner in which any such school, institution, or system is administered by such State and subdivision.

I therefore respectfully request and strongly urge the adoption of this amendment which will end the second tragic era in the South.

Senator KEFAUVER. Well, thank you very much, Mr. Beard. It is apparent that you have given this matter a great deal of thought and study.

Mr. BEARD. I will be glad to answer any questions that anyone has.

Senator KEFAUVER. There is one very interesting point which you refer to on page 9 of your statement, that is, that after a resolution containing an amendment has been approved by two-thirds of each House

of Congress and after it has been submitted to the States for ratification by their legislatures or by their conventions, it must be ratified by three-fourths of the States; I assume we are going to have 50 States. Three-fourths of 50 is somewhere between 37 and 38.

Mr. BEARD. We had that, Senator, when they ratified it before; there were 37 States then, and it would have needed 28 to have ratified it.

Senator KEFAUVER. So future amendments will require 38 States to ratify.

Mr. BEARD. Yes, that is right; it will take 38 States.

Senator KEFAUVER. Yes.

Mr. Beard, Senator Dodd asked the witnesses several questions yesterday. He has written to this subcommittee's counsel asking him to put the same questions to the witnesses today. And I think it is important to bring out just exactly what he has been endeavoring to bring out, that is just exactly what this amendment means. The history generally is, as you have set out in your statement, that the 14th amendment was passed in 1868.

Mr. BEARD. Yes.

Senator KEFAUVER. And then a number of cases interpreting it, including the *Slaughter-House cases*, were decided.

Mr. BEARD. Yes, sir.

Senator KEFAUVER. Later, in 1896, a transportation case, *Plessy* v. *Ferguson*, supra, was decided establishing the doctine of "separate but equal." Then that was applied to the schools in later cases. And, then, in the *Brown* case, the Court changed the application from "separate but equal" to "equal."

Is it your feeling that this proposed amendment goes back to *Plessy* v. *Ferguson*, or does it go all the way back before the 14th amendment?

Mr. BEARD. I do not think that it would repeal, by implication, *Plessy* v. *Ferguson*. I think that the States would be bound to provide separate but equal facilities.

Senator KEFAUVER. Well, how do you read that requirement into this amendment?

Mr. BEARD. Well, they are vested in the States.

Senator KEFAUVER. The amendment reads that the control of the school districts shall be exclusive.

Mr. BEARD. Well, that amendment, Senator, certainly could not go back and repeal decisions of the Supreme Court, except where it is expressly aimed at this decision in the *Brown* case.

Senator KEFAUVER. What it does is to exclude public schools from the protections of the 14th amendment. Is that not what it does?

Mr. BEARD. Well, it excludes from the Federal Government; it does not, I do not think——

Senator KEFAUVER. Well, read the amendment, Mr. Beard:

And nothing contained in this Constitution shall be construed to deny the residents thereof the right to determine for themselves——

Mr. BEARD. Yes.

Senator KEFAUVER (continuing.)

the manner in which any such school, institution, or system is administered by such State and subdivision.

What do you construe that to mean?

Mr. BEARD. Well, I still do not think that any State could exclude colored students. I think that it would mean that they would be bound to provide separate but equal facilities; because I think that is so ingrained in our——

Senator KEFAUVER. But "separate but equal" comes about as a result of the 14th amendment, does it not?

Mr. BEARD. In construction of the 14th amendment that is the way they construed it.

Senator KEFAUVER. If you take the schools out of the 14th amendment completely, does that not repeal *Plessy* v. *Ferguson* also?

Mr. BEARD. I do not know if it does or not, Senator. I think it might. The amendment might be clarified to guard against any situation like that.

Senator KEFAUVER. How would you clarify it?

Mr. BEARD. I am not prepared to write that out, but when I read this amendment in the first place I thought that it could have been improved upon.

Senator KEFAUVER. Frankly, when I first saw the amendment I thought that it was an effort to go back to *Plessy* v. *Brown*. Looking at it further, it is apparent that it goes back before the adoption of the 14th amendment insofar as schools are concerned.

Mr. BEARD. Well, if you put a rider on there "provided, however, that separate but equal facilities must be maintained."

Senator KEFAUVER. Then you reinstate the 14th amendment.

Mr. BEARD. Not necessarily. Separate but equal. They were willing to accept the 14th amendment on the basis of separate but equal facilities.

Senator KEFAUVER. What is your judgment about the matter; do you think that it should be separate but equal?

Mr. BEARD. I think it should be separate but equal. I am in favor of giving the control of education to the States. But I think that the rights of minorities, colored or white or whatever they are, should be safeguarded, that there should be separate but equal facilities there. And I think that this amendment, even though it may not be perfect, is a step in the right direction to attempt to get rid of some of the chaos that undoubtedly does exist in schools throughout the South.

Now, I have a long letter here from the people over in Front Royal, Warren County, Va., and their problem is terrific there. The members of the CIO union—there are several thousand of them—have contributed so much out of their weekly pay. It amounts to, I think, something like $8 a month, to maintain these private schools in Front Royal. Now, those people believe in it.

Senator KEFAUVER. Yes, it is a very difficult situation on the children.

Mr. BEARD. It is. They are the real sufferers in this, both colored and white.

Senator KEFAUVER. Mr. Fensterwald, do you have a question?

Mr. FENSTERWALD. I would like to ask one brief question that was raised yesterday and is raised in Mr. Beard's statement.

Mr. Beard, do you think that Alaska and the other 11 States, which have special clauses in their acts of admission with respect to exclusive control, have any greater rights than the other 38 States?

Mr. BEARD. I do not believe they do.

Mr. FENSTERWALD. In your statement here you refer to Alaska.

Mr. BEARD. Yes.

Mr. FENSTERWALD. And I was just wondering whether you intended to imply that the act of admission of Alaska was not subject to the 14th amendment.

Mr. BEARD. No, I think it is. But it shows that the attitude of the people who drew that act was to place the control of schools in the local government.

Mr. FENSTERWALD. Yes, but within the framework of the Constitution.

Mr. BEARD. Yes, exactly, within the framework of the Constitution as drafted. There could be no other explanation.

Mr. FENSTERWALD. So today all 49, or all 50 States, are in an identical position as far as exclusive control is concerned?

Mr. BEARD. Yes.

Mr. FENSTERWALD. That is all I have, Mr. Chairman.

Senator KEFAUVER. Mr. Chumbris?

Mr. CHUMBRIS. I have no questions. Thank you.

Senator KEFAUVER. Do you want to ask Mr. Beard about the Federal areas where——

Mr. CHUMBRIS. Well, you heard the question I propounded to Mr. Hart. How do you feel about the Federal Government contributing funds to areas where there is an excessive amount of military personnel or unusual amount of Federal employees such as the northern part of Virginia and the bordering areas to the District of Columbia, Montgomery County and Prince Georges County?

Mr. BEARD. Well, those cases, I think, are the exceptions rather than the rule. They are exceptions to the general principle of having the States control the schools. And I think that Mr. Hart made a very good answer to that when he stated that it might be in the military budget to assume part of the expense of the schools that were necessitated by the military personnel there.

Mr. CHUMBRIS. That brings out another question, too, and this is a legal question. Maybe you might want to think it over. But do you think that there is anything in the suggested amendment that would preclude the Federal Government from contributing?

Mr. BEARD. No; I do not think there is in the amendment; no, sir.

Mr. CHUMBRIS. You think that even if the amendment were passed there would be nothing in it to prevent Congress from appropriating——

Mr. BEARD. Appropriating.

Mr. CHUMBRIS (continuing). Either matching funds or contributing toward——

Mr. BEARD. That is right.

Mr. CHUMBRIS (continuing). Construction of schools in federally impacted areas?

Mr. BEARD. I agree with that.

Mr. CHUMBRIS. Where there is an excessive amount of Federal employees.

Mr. BEARD. In my statement there is just one clause—I will just take 1 minute: Frederick M. Raubinger, commissioner of education of New Jersey, stated in Atlantic City on February 16, 1959, that a proposed $1,400,000 research project of the U.S. Office of Education "lets the camel's nose into the tent."

Senator KEFAUVER. Do you have anything else, Mr. Chumbris?

Mr. CHUMBRIS. I have nothing further.

Senator KEFAUVER. Thank you very much, Mr. Beard.

Mr. BEARD. Thank you, Senator.

Mr. FENSTERWALD. There are no other witnesses this morning, Senator. If it is agreeable, we will meet in this room at 2 o'clock this afternoon to hear the two witnesses scheduled at that time.

Senator KEFAUVER. Very well, we will stand in recess until 2 o'clock this afternoon.

(Whereupon, at 11:15 a.m., the subcommittee recessed to reconvene at 2 p.m. of the same day.)

AFTERNOON SESSION

Senator DODD (presiding). The subcommittee will come to order. As our first witness this afternoon we have Mr. Wright Morrow, of Houston, Tex.

Mr. Morrow, we are glad to have you here and look forward to hearing from you.

Mr. MORROW. Thank you.

STATEMENT OF WRIGHT MORROW, REPRESENTING THE SAN JACINTO CHAPTER OF THE SONS OF THE REPUBLIC OF TEXAS, AND THE PAUL CARRINGTON CHAPTER OF THE SONS OF THE AMERICAN REVOLUTION

Mr. MORROW. I desire to express my gratitude to this subcommittee for the privilege of presenting to the members thereof my views and testimony in connection with Senate Joint Resolution 32. As a practicing lawyer and as a citizen of Texas, I appreciate this opportunity and hope that I shall be able to present appropriate testimony which may be of some benefit to you as members of this subcommittee.

By way of introduction and identification of myself, Senator Dodd, because I am sure I am not known to most of you——

Senator DODD. You are known to me. I think everybody ought to know you.

Mr. MORROW. I should like very much to——

Senator DODD. I should say very favorably, Mr. Morrow.

Mr. MORROW. Thank you very much.

Senator DODD. You are a distinguished member of the bar, and I place great weight and importance on anything you have to say on any question of this kind.

Mr. MORROW. Thank you. My father, Judge Wright C. Morrow, was for 25 years chief justice of a court of last resort in Texas; my mother's brother, Judge B. D. Tarlton, was chief justice of an appellate court and later a member of the Supreme Court of Texas; and still later, a professor of law at the University of Texas. My two brothers and I all have practiced law most of our lives. When I was a young man, I was first assistant attorney general of Texas, and for two terms was Democratic national committeeman for Texas. I have therefore, been nurtured in the law and under the principles of constitutional law. I am a firm and consistent believer in the genius of

our form of government and I have the highest respect for law and for the courts of our country.

Senate Joint Resolution 32 seeks to add to the Constitution of the United States in plain and unambiguous language an article that the administrative control of any public school, public educational institution or public educational system operated by any State by any political or other subdivision thereof shall be vested exclusively in such State or subdivision and that nothing contained in the Constitution shall be construed to deny to the residents thereof the right to determine for themselves the manner in which any such school, institution or system is administered by such State or subdivision.

I have the deep conviction that this proposed amendment should be submitted to the States and express the fervent hope that it will be ratified and become a part of our Constitution.

Some recent decisions of the Supreme Court of the United States, particularly *Brown* v. *Board of Education* (347 U.S. 483) strike at the very heart of our Republic and undermine the fabric of our system of Government as I see it. I say this as a lawyer nurtured in the principles of constitutional law. I regard it as a right, not only, but as my duty as a citizen to express my views. I do not attack the place held by the Supreme Court in the makeup of our constitutional framework. On the contrary, I am a firm and strong supporter of the constitutional function and authority given to the Supreme Court.

The problem here transcends the question of racial segregation. It goes to the very vitals of our constitutional framework. In my opinion, the present court has completely disavowed judicial restraint.

We have made the constant boast as a free people that we are entitled to express our convictions privately and publicly concerning the conduct of our public officials. I intend to be constructive and temperate, but I hope to be candid and courageous.

I do not share the view expressed by some that the decisions of the Supreme Court should be beyond the criticism of the people. I do share the view expressed by Justice Brewer in an early decision of the Supreme Court, where he said:

> It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the object of constant watchfulness by all and its judgments subject to the freest criticism. The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo.

Those who composed the Convention in 1787 had risked their lives, their liberties and their fortunes in the Revolutionary struggle; they knew what they had fought for.

I may interpose here, Senator Dodd, that this accentuation on these things is mine.

Senator DODD. Yes.

Mr. MORROW. I find it very much easier to say what I think when I do this.

They were fully cognizant of the suffering of their forebears in the struggle for freedom and dignity under the rule of law instead of the rule of man. They, therefore, made the Constitution say in explicit language who should make the laws and how laws should be made.

They defined "The Supreme Law of the Land" in article VI, quoted in part, as follows:

> The Constitution and the laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land.

The Constitution is the creature of the people and the States; the Constitution formed a government of laws and not of men. The members of the Convention rejected the idea of a monarchy or of a pure democracy and set up a republic of limited powers, separate executive, legislative, and judicial branches. It was for this reason that the 10th amendment was adopted specifically providing that all powers not delegated to the Federal Government were reserved to the States and to the people. The child, the Federal Government, was given specific and fixed rights, and all others remained with the States, the people, the parents of the Federal Government.

We should never forget that those who framed this great system of government wanted to be doubly sure that the Federal Government should be obligated to control itself. It was James Madison, credited with much responsibility for the language of the Constitution, who said:

> In framing a government to be administered by men over men, the great difficulty lies in this: You must enable the government to control the governed, but in the next place oblige it to control itself.

Alexander Hamilton emphasizes this necessity in speaking in the Federalist of article VI quoted above, using this language:

> It will not, I presume, have escaped observation that it [art. VI] expressly confines this supremacy to laws made pursuant to the Constitution.

As Chief Justice Taney said in a very early case:

> The Government of the United States is one of delegated and limited powers, it derives its existence and authority altogether from the Constitution; neither of its branches, executive, administrative, or judicial can exercise any of the powers of government beyond those prescribed and granted.

George Washington, in his farewell address used this language, which is very pertinent and appropriate here:

> If, in the opinion of the people, the distribution or modification of the constitutional powers be in any part wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed.

It is elementary that the law is the very embodiment of usage; that is to say, the principles of action evolved by reason of experience, traditions, habits, customs and rules of conduct common to all people in a given area of the world make up the basis of the law and the law comes into being (as did the Constitution) by virtue of these common attributes, common privileges and common duties. The stability of the Government depends on law, fixed law, upon which people can rely as a part of their lives. Things adjudicated, or matters litigated and determined by competent authorities, by courts of last resort, become a part of the life of the people. Better stated, it is the doctrine of stare decisis. The specific translation of this phrase means to stand by decided cases; to uphold precedents; to maintain former adjudications. The rule is based on public policy which requires that courts respect their prior decisions and that a rule once declared and uni-

formly followed over a long period becomes the law, guiding the people in their conduct. It rests upon the principle that law by which men are governed should be fixed, definite, known. The complete Latin phrase is: "Stare decisis et non quieta movere." This literally means to adhere to precedents and not to unsettle things which are established.

This definition is given both in Black's Law Dictionary and Cooley's Constitutional Limitations, and has been followed by Federal and State courts throughout the history of the jurisprudence of our country.

It is my firm and considered opinion that the Supreme Court, in the 1954 decisions on racial segregation in public schools, is indefensible and their interpretation of the 14th amendment has substituted the personal philosophy of its present members for a rule of law established by tradition, habit, custom and long-time precedent of its former decisions, and in this manner has usurped the power of the States to amend the Constitution.

Mark you again the advice of George Washington:

> The Constitution should be amended in the manner fixed therein and not by usurpation.

More than a hundred years ago Chief Justice John Marshall said:

> Courts are the mere instruments of the law and can will nothing * * *. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the law.

Again, James Madison, in discussing the necessity and value of judicial precedents said:

> The good of society requires that the rules of conduct of its members should be certain and known, which would not be the case if any judge disregarding the decisions of his predecessor should vary the rule of the law according to his individual interpretation.

Thomas Jefferson, in discussing the limitations of constitutional power made this cryptic statement:

> In questions of power let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution.

And Chief Justice Marshall said again in his great opinion in *Gibbons* v. *Ogden*, 22 U.S. 1, that:

> The enlightened patriots who framed our Constitution and the people who adopted it must be understood * * * to have intended what they said.

Let us then undertake to determine whether the Supreme Court has usurped the power to amend the Constitution by its interpretation in *Brown* v. *Board of Education* and the companion cases in 1954.

Soon after the adoption of the 14th amendment in 1877, in considering a statute of Louisiana requiring the commingling of the races—I believe this was during the Reconstruction period—the Supreme Court then said:

> We think this Statute * * * is unconstitutional * * *. Substantial equality of right is the law of the State and of the United States, but equality does not mean identity, as in the nature of things identity in the accommodations afforded to passengers, whether colored or white is impossible.

Then comes the much quoted *Plessy* v. *Ferguson* case (163 U.S. 537) in 1896. Here the Court also passed on a Louisiana statute, this time requiring separate accommodations for colored and white pas-

sengers on common carriers. The Court said (Justice Brown writing the opinion):

The object of the 14th amendment is undoubtedly to enforce the absolute equality of the two races before the law but in the nature of things it could not have been intended to abolish distinctions based upon color or enforce social, as distinguished from political equality, or commingling of the two races under terms unsatisfactory to either. Laws permitting, and even requiring their separation do not necessarily imply the inferiority of either race to the other and have been generally, if not universally, recognized as within the competency of State Legislatures.

The Court said further:

It is settled law that the school board may assign a particular school for colored children and exclude them from schools assigned for white children, and such regulation is not in violation of the 14th amendment.

The court held that the establishment of separate schools for white and colored children has been held to be a valid exercise of the legislative power of the States.

Then, as if pointing to the fallacy of the philosophy or psychology of the recent decision in *Brown* v. *Board of Education* case, Justice Brown (for the Court) said:

The argument also assumes that social prejudices may be overcome by legislation and that equal rights cannot be secured to the Negro except by an enforced commingling of the two races. We cannot accept this proposition.

In view of the continuous public statements of the proponents of the Court's decision in condemning our position in the South, it is noteworthy that the author of the *Plessy* case, Justice Brown, was born in Massachusetts, educated at Yale, and was a citizen of Michigan when appointed to the Court by a Republican President.

Much has also been said by the proponents of school integration about the dissent of Mr. Justice Harlan in the *Plessy* case.

I notice, Senator Dodd, that you mentioned Justice Harlan's dissent yesterday.

It is therefore significant that 3 years later, in 1899, the same Justice Harlan wrote for the Court in the case of *Cummings* v. *Board of Education*. Here they were considering an injunction compelling the school board to withhold its assistance from a white high school for failure to provide a high school for colored students. Justice Harlan used this language and there was no dissent:

We may add while all admit the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, that education of the people in the schools maintained by State taxation is a matter belonging to the respective States * * *.

In 1914 the Court in dealing with a statute of Oklahoma in the *McCabe* case, said this:

It has been decided by this Court, so that the question could no longer be considered an open one, that it was not an infraction of the 14th amendment for a State to require separate but equal accommodations for the races.

This was 46 years after the passage of the 14th amendment.

Thirteen years later, in 1927 a beloved former Republican President, Chief Justice Taft, in a case involving a Chinese girl being denied admission to a white school (*Gong Lum* v. *Rice*, 275 U.S. 78), wrote the opinion for the Court and said:

The right and power of the State to regulate the method of providing for the education of its youth at public expense is clear.

As a matter of stare decisis, as a matter of tradition and of stability, the people of the United States had a right to rely upon these decisions. They pass on the precise state of facts before the Supreme Court in the 1954 case.

In the *Gong Lum* case, Chief Justice Taft said further:

> We think this is the same question which has been many times decided to be within the constitutional power of the State legislatures to settle without intervention of Federal courts under the Federal Constitution. * * * The decision is within the discretion of the State in regulating its public schools and does not conflict with the 14th amendment.

Sitting on this Court with Chief Justice Taft in this unanimous decision were the great judges and liberals, Justice Oliver Wendell Holmes and Justice Louis D. Brandeis and Justice Harlan Fiske Stone. So I think we are in very good judicial company, those of us who yet believe that is the right decision.

One of the cases cited by Chief Justice Taft was a case in the Massachusetts Supreme Court, written by Chief Justice Shaw of that court in which they upheld the separation of white and colored under the State constitution guaranteeing equal protection of the law.

And again, when the present Supreme Court has disregarded all judicial restraint and rejected all precedent and is exercising legislative functions entrusted to the Congress and usurping the power of amendment of the Constitution, they scorn the case of *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337. This decision was by Chief Justice Hughes, appointed twice to the Supreme Court from New York State and a Republican candidate for President. The action was brought by a Negro, to compel admission to the Missouri State University Law School. The Missouri constitution provided that separate free public schools should be established for the people of African descent. The contention was made that this was discrimination and a denial of a constitutional right. Speaking for the Court, Chief Justice Hughes said:

> The State court has fully recognized the obligation of the State to provide Negroes with advantages for higher education equal to that afforded to white students. The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method, the validity of which has been sustained by our decisions—

reaffirming the holding in the *Plessy* and *Gong Lum* cases.

During the nearly 80 years of judicial determination by the Federal Courts, this same subject has been before State courts without number—Northern and Southern States alike—and it has been uniformly held, in reliance on these Supreme Court cases that the right and power of the State to regulate the method of providing for the education of its youth at public expense is clear. Thus a great body of decisions has been built upon the faith of these cases. This rule has been upheld in New York, Ohio, North Carolina, Kansas, Missouri, Nevada, Mississippi, and most other States. The adjudication was universally the same and a way of life was established under the fixed law of our country by courts confronted with this exact problem. These decisions and this way of life was relied upon. The people had a right to rely upon them. It was a settled part of our jurisprudence.

A strong evidence to me of the desire of the present Supreme Court to legislate is demonstrated in the companion case to the *Brown* case, namely *Bolling* v. *Sharpe*, 347 U.S. 497. There the Court was dealing

with racial segregation in the public schools of the District of Columbia. The Court held that the due process clause of the muchly abused fifth amendment prohibits racial segregation in the public schools of the District of Columbia. One hundred and sixty-seven years after the adoption of the fifth amendment in 1791, this Court comes up with this decision and arrives at this change in the law. Congress had not legislated to this effect, and if separation of the races in the District of Columbia schools was legal in 1868 when the 14th amendment was adopted and in 1914 and in 1927, we wonder when the Constitution was changed and how was it amended, because it became unconstitutional after May 17, 1954. Chief Justice Warren said it was "unthinkable" that in the Capital of this Republic separate schools were being maintained. Yet, it had been so for many, many years.

These decisions are simply declarations of the present members of the Court expressing their individual views. They disregard all the wisdom and experience of their predecessors who, over a period of almost a century, passed on the same question, and substitute therefor what they call modern authority.

The chief authority upon whose writing they rely seems to be a man named Gunnar Myrdal, a Swedish sociologist, who spent a few years here in this country and now becomes the highest authority for our highest Court. The same author in his book called "An American Dilemma" expressed the opinion that our Constitution is "impractical and ill suited for modern conditions" and "is outmoded and should be abandoned."

When the doctrine of "separate but equal" was first announced by the Supreme Court, not one single State voiced a protest or claimed misinterpretation of the 14th amendment. Moreover, Congress, from the date of the amendment in 1868 until 1954 demonstrated their understanding of the Constitution by actively maintaining separate schools in the District of Columbia.

It is a universal doctrine in our jurisprudence that the contemporaneous construction of a statute or constitutional provision by those who are charged with the duty of its enforcement is worthy of the most serious consideration as an aid to its interpretation, particularly where such construction has been sanctioned by long acquiescence.

Here the Supreme Court decisions for 80 years establish a uniform principle and uniform result. Here the Congress (with the authority fixed in section 5 of the 14th amendment, namely, "The Congress shall have the power to enforce by appropriate legislation the provisions of this article") had not in their wisdom found it necessary or appropriate to legislate on this subject or to deviate from the established law of the land under the decisions of the Supreme Court and the universal practice of the States in their regulation of public schools.

It is no wonder, therefore, that the conference of the chief justices of the States meeting in California last August should have passed this resolution:

We are not alone in our view that the Supreme Court in many cases arising under the 14th amendment has assumed what seems to us primarily legislative [lawmaking] powers * * *. We do not believe that either the framers of the original Constitution or the possibly somewhat less gifted draftsmen of the 14th amendment ever contemplated that the Supreme Court would or should

have the almost unlimited policymaking powers which it now exercises. It is strange indeed to reflect that under a Constitution which provides for a system of checks and balances, of distribution of power between National and State governments, one branch of one government [the Supreme Court] should attain the immense, and in many respects, dominant power which it now wields.

That is the end of the quotation by the State justices' conference.

This opinion of 36 State supreme court justices finds tremendous support in the advice given by George Washington.

Witness, also, the recent statement of an eminent jurist, for many years a member of the circuit court of appeals in New York State, a man regarded as a liberal, but distinguished as a fearless judge who did not allow considerations of political expediency or emotional feelings to impair his reading of the Constitution or his study of the basic precedents established by the courts in previous years. I refer to Judge Learned Hand's recent lectures before the Harvard Law School. Judge Hand finds himself perplexed by the decisions in the segregation cases; he says it is curious that the Supreme Court failed to mention section 5 of the 14th amendment which he says—

offered an escape from intervening for it empowers Congress to "enforce" all the preceding sections by "appropriate legislation."

Judge Hand further says:

I cannot frame any definition that will explain when the Court will assume the role of a third legislative chamber and when it will limit its authority to keep Congress and States within their accredited authority.

He says he has not been able to understand on what basis the Court adopted the view that it may actually legislate. He asks the question of whether we should establish a third legislative chamber, and then says:

If we do need a third legislative chamber, it should appear for what it is and not as the interpreter of inscrutable principles.

Further, Judge Hand says:

For myself, it would be most irksome to be ruled by a bevy of platonic guardians even if I knew how to choose them, which I assuredly do not.

Moreover, Judge Hand says that he doubts whether any judge should be permitted "to serve as a communal mentor."

The argument is made that the Constitution must keep step with the times and that it is subject to the changes in our lifetime. I hold to the view that truths never change and that principle is based on truth. I am no standpatter. I recognize that changes do come and must be given full and fair consideration; but I believe that those who claim that the Constitution does not mean what it says and the precedents of former decisions are not binding and establish a way of life, are usually those who labor under the delusion that there was little wisdom on earth before they were born. They forget that without them there was a yesterday, and without them there will be a tomorrow.

In his book on "The Nature of the Judicial Process," the former Justice Benjamin N. Cardozo, in discussing the right of a judge to substitute his individual sense of justice for rules of law, said this:

That might result in a benevolent despotism if the judges were benevolent men. It would put an end to the reign of law.

Justice Brandeis also quoted this truth when he said:

> It is usually more important that a rule of law be settled than that it be settled right.

The lack of judicial restraint referred to in the resolution of the State chief justices is apparent in these later decisions. One of the fine Federal judges undertook for his own guidance to say:

> He will not overrule a precedent unless he can be satisfied beyond peradventure that it was untenable when made; and not even then, if it has gathered around it the support of a substantial body of decisions based on it.

This is precisely what has happened in our American life since 1868 until 1954.

The words of Justice Robert H. Jackson in the case of *Brown* v. *Allen* supports the viewpoint of those who believe the Supreme Court has usurped the power of amendment confided to the States under the Constitution. Justice Jackson said this:

> Rightly or wrongly, the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law but is guided in these matters by personal impressions which from time to time may be shared by a majority of the Justices. * * * that regard for precedents and authorities is obsolete; that words no longer mean what they have always meant to the profession; that the law knows no fixed principles.

(At this point in the proceedings, Senator Kefauver entered the hearing room.)

Mr. MORROW. Again, Justice Cardozo in his book discussing the difference between right and power, says:

> Judges have, of course, the power though not the right, to ignore the mandate of the statute and render judgment in spite of it. They have the power, though not the right, to travel beyond the bounds set to judicial innovation by precedent and custom. Nonetheless, by that abuse of power, they violate the law.

Another and a different reason for the position I take with respect to the Supreme Court's segregation decision is the fact, little known until now, that there are 12 States which upon their entrance into the United States were granted exclusive control of their State schools. It appears from a recent check of the admission acts of all of the States that 12 have been granted this specific authority. The last such grant was made this year to Hawaii.

This, of course, is an unequal and unfair treatment and will result in unlimited confusion and instability.

I am informed the States of North and South Dakota, Montana, Washington, Utah, Wyoming, Idaho, New Mexico, Arizona, Oklahoma, Alaska, and Hawaii have been granted this exclusive control of their State schools. While I am a southerner and the people of the South have been charged with dereliction to duty in their refusal to accept the strange philosophy attributed largely to the authority of one Gunnar Myrdahl given full credence under the judgment of the Supreme Court, I am convinced not only people of the Southern States but those of many other States of the Union, Eastern, Northern, and Western alike, will come to the final conclusion that the rights of the States have been again seriously impaired, and regardless of their personal feelings, they will come to the conscientious belief that we in the South are upholding the fundamental concepts of our constitutional system.

Therefore, I favor the adoption of Senate Joint Resolution 32 and reiterate my hope that it becomes a part of our Constitution.

First, its submission and adoption is proposed to be done in the manner and method prescribed in the Constitution and not by judicial decree or usurpation. The people of the States are accorded their rightful place and function in the amendment of the basic document.

I should say this is definitely in line with the words of George Washington.

Second, if submitted and adopted, it will reestablish for and by the people the validity and the wisdom of the judgment of the Supreme Court decided by the able and patriotic Justices through these many years.

Third, the stability of the law will be regained, the way of life upon which the people rely and had a right to rely will be restored and sanctioned and firmly fixed;

Fourth, the continuing value of precedent and stare decisis known to our American jurisprudence through its whole life, will again be recognized and enforced;

Fifth, that these decisions have produced a most regrettable decline in white and Negro relationships throughout the country, particularly in the South—not on an individual basis because we still maintain warm individual relationships—but there is a wider and wider division among the races. These decisions, this departure from constitutional authority, has caused the greatest disturbance since the Civil War. If this amendment is proposed and adopted, the matter will be settled in a constitutional manner and the prime constitutional ideal of "domestic tranquillity" will be tremendously improved;

Sixth, this amendment, if submitted and adopted, will express the dominant view of the people of the United States that an overpowering centralized government in Washington was not intended to be a part of the basic fabric of our system. It will prove again the wisdom of Chief Justice Taft where he says "the right and power of the State to regulate the method of providing for the education of its youth at public expense (is) clear";

Seventh, if submitted and adopted, this amendment would show that the people believe in the specific language of the Constitution, article I, section 7, which gives to the Congress the power to make all laws which shall be necessary and proper to carry into execution the powers granted and all other powers vested by the Constitution in the Government of the United States or in any department or officer thereof. In this manner the people of the United States will reassert that the Supreme Court is not a legislative body but a judicial body;

Eighth, since under section 2 of article II of the Constitution, no nominee of the President becomes and remains a member of the Supreme Court except "with the advice and consent of the Senate," the submission of this amendment and the public debate that would necessarily follow would emphasize the significance and importance of this privilege and duty of the Members of the Senate of the United States;

Ninth, if this amendment is proposed and adopted, we will reestablish the fundamental doctrine that this is a Government of law

and not of men; that there shall not be substituted for the law of the land the whim of a judge or judges based on his or their personal philosophy, and the power and authority and function of Congress shall become stronger and more effective.

The foundation of our national strength lies in the freedom of man's initiative; the reward for his efforts and the recognition by a just Government of the dignity and personality of the citizen. As Americans, we are born with a heritage of freedom and we are, as a people, devoted to liberty and a religious faith. The Constitution is at once our shield and our sword. It is the very essence of our right to live as free men and women.

If the civil and political rights of both races be equal, one cannot be inferior to the other, civilly or politically. If one kind of person be unequal to another kind of person socially, neither the Constitution of the United States nor the opinion of any number of judges can put them upon the same social plane.

Tenth, if this amendment is proposed and adopted, the full sovereignty of the separate States will be reconstructed and reinvigorated; and if the sovereignty of the States is not preserved, the Constitution will fall. Court-made law, which has no sanction from the people nor from the Congress, nor from the Constitution, cannot stand.

I do not say that the Supreme Court can be denied the right and power in any instance to overrule a prior decision, where the proper judicial restraint may justify such action. Certainly, it is not to satisfy the emotional or sentimental feelings of the individual members of the Court nor is it to express their social philosophy as opposed to the fixed law. The guide which Judge Thomas Swan applies seems as sound as can be given. That is that he would not overrule a precedent unless he was absolutely satisfied it is untenable and even then, if it has gathered around it the support of a substantial body of decisions based on it.

Eleventh, this amendment, if proposed and adopted, would give all of the States the same rights with respect to the exclusive control of their educational institutions, with the one exception, namely, that in the act admitting Oklahoma, there was a specific provision that the act could not be construed to prevent the establishment and maintenance of separate schools for white and colored children. This was specific to Oklahoma. As to the other 11 States which have already been granted this right the language seems to be uniform, even as late as when Alaska and Hawaii were granted statehood this year. This position should be uniform in the States.

Ours is the greatest system, Mr. Chairman, of government that man has yet conceived and we are all proud of it. It has given the people more freedom, and has devoted itself to the protection of the individual, dedicated to the dignity of man's soul, and has thus brought the greatest contentment to our people. To justify our heritage, we cannot fail to support it with all our hearts and all our minds and all our energies.

Let me express what I believe to be the sound view and obligation of those who occupy the highest judicial position under our system who hold their offices for life (except for the right of impeachment). In the words of Chief Justice White:

> The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the Court without regard to the personality

of its members. Break down this belief in judicial continuity and let it be felt that on great constitutional questions this Court is to depart from the settled conclusions of its predecessors, and to determine them according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people.

In my opinion this is the pattern which should be (but has not been) followed by this Court of last resort.

To you distinguished gentlemen who sit on this subcommittee, members of the greatest deliberative body in the world who have the responsibility of passing upon this most important matter, I can say to you with all the sincerity that I possess and in the light of some experience in the practice of law and in the business of trying to be a good American citizen, that in my opinion, you would be performing an act of justice and wisdom to report favorably on this proposed amendment and give to the Congress the right to offer to the people of the United States the opportunity to express their desire to determine for themselves the method of managing and administering their public schools according to the wishes of the people of the States.

I should like to add, Mr. Chairman, if I may, with your permission, that I would like for the record to show that I appear here at the suggestion and as a representative and speaking the views of the San Jacinto chapter of the Sons of the Republic of Texas; and that I have the same right to speak and was asked to speak on behalf of the Paul Carrington chapter of the Sons of the American Revolution.

Both of these societies are well known, patriotic, American organizations, and gave me the opportunity to present their views at this time.

I appreciate very much, Mr. Chairman and gentlemen of the subcommittee, the opportunity to be here and say what I have to say.

Senator KEFAUVER. Thank you, Mr. Morrow.

Mr. MORROW. I shall be glad to try to answer any questions if I can do so.

Senator KEFAUVER. Senator Dodd?

Senator DODD. Yes. I have been asking these questions of some of the witnesses, Mr. Morrow, I should explain that my sole purpose is to keep the record clear.

I notice in your statement you cite the *Gaines* case.

Mr. MORROW. Yes, sir.

Senator DODD. You are not citing that in support of your position, are you?

Mr. MORROW. I cited the *Gaines* case; the decision of the Court was not relative to my position, but the language of the Court where it states that the court, the State court, has fully recognized the obligation to provide Negroes with advantages for higher education, the validity of which has been sustained by decisions that the State has that function. That was the purpose.

Senator DODD. I thought that ought to be made clear. As a matter of fact, that decision I would say is contrary to your position.

Mr. MORROW. The result of the decision is against the proposition that was before it in this instance, but the language that I quote is there.

Senator DODD. Well, this is what I mean by keeping the record straight. Let me read from Mr. Chief Justice Hughes' opinion, and I quote from it:

> By the operation of the laws of Missouri, a privilege has been created for white law students which has denied the Negroes by reason of their race. A white resident is afforded legal education within the State. The Negro resident having the same qualifications is refused it there and must go outside the State to obtain it.

This is what Chief Justice Hughes said in that *Gaines* case:

> That is a denial of the equality of legal right, to the enjoyment of the privilege which the State has set up and the provision for the payment of tuition fees in another State does not remove the discrimination.

Mr. MORROW. That is correct, Senator. The decision was that not setting it up within the State of Missouri and making them go out of the State is a denial. But he did say, I am sure what I quoted here.

Senator DODD. No. I don't find it in the text, but I am sure it is there.

Mr. MORROW. You don't find it?

Senator DODD. I don't find it in what I have here. I haven't had time to read the whole opinion over again. I am not denying that you quoted accurately. My point is to make clear that the decision in the *Gaines* case required the State of Missouri to provide a legal education to this applicant who had been denied that right.

Mr. MORROW. That is right.

Senator DODD. And this brings me to another consideration.

It has been suggested here—and I think I may say accurately that it has been repeated in your testimony—that the decision of the Supreme Court in 1954 was a sudden reversal of a long line of decisions holding to the contrary.

I think any reading of the cases for the Supreme Court over a period of approximately 30 years will reveal that the Court had been moving inexorably toward the decision in the *Brown* case in 1954, and I wonder if you would agree with me.

Mr. MORROW. No. I do not say that it was a sudden movement. I don't think you would find that in my statement. I said that it created a great body of law as a result of it over the period of years, and that during that period of time Congress had not intervened in anyway but had manifestly held that the right to segregate in the District of Columbia was appropriate. Otherwise I didn't pass on it.

But I don't deny to you, Senator Dodd, that there was a possibility, there was a probability that they would have come to the conclusion that they did come to.

Senator DODD. Well, I had reference to this paragraph in your statement. You say:

> These decisions—

and obviously you must mean the decisions leading up to the 1954 decision—

> are simply declarations of the present members of the Court expressing their individual views. They disregard all the wisdom and experience of their predecessors who over a period of almost a century passed on the same question, and substitute therefor what they call "modern authority."

Mr. MORROW. If I didn't make myself clear, I referred to the decisions in the *Brown* case and the *Sharpe* case. Those decisions

were declarations in my opinion of the present members of the Court expressing their individual views.

Senator DODD. And the decisions leading up immediately preceding this.

Mr. MORROW. I had no specific reference to the decisions earlier than that. I should have been more specific, but I was talking about the *Brown* case and the segregation decisions.

Senator DODD. Let me read you something, if you will indulge me.

Senator KEFAUVER. Certainly.

Senator DODD. See if you agree with this:

It is not possible to go through all the cases here—

and this has reference to the cases on these questions—

but an indication may be made. In 1917, a unanimous Court, including Chief Justice White, who was a Confederate veteran, held that a Kentucky city could not enforce segregation in housing through a zoning ordinance. In 1938 the Court held that a State must provide a Negro a legal education within the State, and could not send him out to another State.

By the way, that is the *Gaines* case.

In later cases, in 1948 and 1950, the Court held that Negro law students could not be excluded from State university law schools.

Mr. MORROW. One of the Texas cases.

Senator DODD (reading):

Negro students have been going to the law schools of the Universities of Texas, Oklahoma, Arkansas, Virginia, and North Carolina, among others, under these decisions for many years—and for years before the cases involving the common schools were decided.

At the same time, a number of cases in the field of voting rights were decided, and the Court held, in several cases, that Negroes could not be excluded from primaries, even when this was sought to be done by various subterfuges and artifices.

In 1948, it was decided that private restrictive covenants, by which a purchaser of land agreed not to sell to a Negro, were unenforcible.

In the early 1950's, a number of cases decided that segregation in pullman cars, in dining cars, and finally in any way on an interstate journey, was invalid.

All of this developed over a period of a good many years. Anyone who chose to look could readily see that in the normal process of development of the law *Plessy* v. *Ferguson* had already been thoroughly discredited, and was clearly on the way out, as has happened to many other cases, including constitutional cases, in the history of the Supreme Court.

Don't you think that is an accurate statement?

Mr. MORROW. I cannot deny to you and would not undertake to say that those cases had not been decided. I remember one of them was in Texas. And I think you will find upon investigation that a great many schools of higher education for Negroes were in the South more than anywhere else, but I would also say to you that the decision of *Plessy* v. *Ferguson*, and subsequent decisions, was still basically the law so far as the Supreme Court was concerned. The matter was not specifically brought before the attention of the Supreme Court, and I cannot say to you that it was not in the cards that they might do so. But I would still maintain that they were expressing the personal views of those members of the Court and not stare decisis.

Senator DODD. I was reading from an article which appeared in the Christian Science Monitor and which was written by Dean Erwin Griswold, entitled "Earl Warren and the Supreme Court." I suggest that it be placed in the record.

Senator KEFAUVER. Without objection that will be printed in the record.

(The document referred to is as follows:)

[From the Christian Science Monitor, Dec. 23, 1958]

EARL WARREN AND THE SUPREME COURT

(By Erwin N. Griswold, written for the Christian Science Monitor)

It is 5 years since Earl Warren became Chief Justice of the United States. He first received a recess appointment in September, 1953, since the Senate was not in session when Chief Justice Vinson passed on. Early the following year the appointment was confirmed, thus placing him in this exalted office, in the Constitution's terms, "during good behavior."

The Chief Justice has no special powers or prerogatives which are of any striking significance. He has a vote in reaching the decisions of the Court, as do all the other Justices. But he has only one vote. He does preside in the Court and at conferences, and can do much to affect the atmosphere at both places. He has a special responsibility for the administration of the Court and he assigns cases for opinion writing, when he is in the majority of the Court.

Yet the Chief Justice inevitably serves as the symbol of his era. We talk about the Marshall court, or the Hughes court, and there is no doubt that history will be concerned with the Warren court. Rightly or wrongly the Chief Justice gets much of the credit—and the blame—for what occurs during his tenure of the office.

During the long history of the United States, only 14 men have held the office of Chief Justice, and three of these were there during the first 12 years. During the present century there have been seven Chief Justices, all very eminent men—Fuller, White, Taft, Hughes, Stone, Vinson, and Warren. All of these led the Court through a certain amount of controversy. When considering Chief Justice Warren and the problems of today, we should not lose sight of history.

WARREN'S BACKGROUND

Earl Warren came to the Court with a remarkable background. He was 62 years old when he was appointed. He had been a lawyer for 39 years. He spent several years in private practice, and a period as a deputy city attorney.

After that he was, in succession, district attorney of Alameda County, Calif., for 14 years, where he made a distinguished record, and appeared before the Supreme Court of the United States on several occasions; then attorney general of California for 4 years, and Governor of California for 10 years.

While Governor he was the Republican nominee for Vice President in 1948. All of these offices gave him intimate opportunities to observe the problems of government in action, to deal with people, and to participate in the administration and, as Governor, in making the laws.

During his tenure as Governor, the population of California increased explosively. He consistently proved himself equal to the tasks which this presented. By common consent, Mr. Warren was a first class Governor, one of the most distinguished Governors this country has had. In the latter years of his tenure of the office he received the nominations of both major parties.

In a sense his experiences was largely political. He had never been a judge, but neither had Marshall or Taney or Fuller or Hughes or Stone when they were first appointed to the Supreme Court. He had been a Governor, as had Hughes just before he had been appointed to the Court as an Associate Justice. And Taft, though he had had judicial experience, had been Governor of the Philippine Islands and then President of the United States.

The task of judging in the Supreme Court is not, far the most part, like that in other courts in the country, and experience has shown in many cases that a record of high achievement in political office is excellent background for a Supreme Court post.

CONTROVERSIAL YEARS

This was an auspicious beginning. What can we say about the Chief Justice's first 5 years in office? We can surely say that they have been filled with controversy.

Speeches have been made about "Storm over the Supreme Court," and much has been written and said about "The Supreme Court Crisis." Often Chief Justice Warren has been the special object of attack, both as a symbol of the Court, and in his own right.

Are these attacks justified? What is the state of the Supreme Court today? What is the place which Earl Warren has established for himself among our Chief Justices?

Before these questions can be properly considered, it is necessary to clear away a large amount of misconception which has been evident in many of the criticisms of the Supreme Court.

1. The United States is not a democracy, except in the special sense in which that term is used in this country. It is not even a representative democracy. The earmark of the great American plan, the contribution of the Founding Fathers to the science of government, the thing that has kept us going as a great nation over a period of more than a century and half of dynamic and constant growth, is that our Government is one of checks and balances.

We do not have a single legislature. We have both the House of Representatives and the Senate. Even if both Houses agree on a measure, it does not become a law without the President's approval, unless there is a two-thirds vote of both Houses after his veto. Even Congress and the President together, even by unanimous vote, cannot pass laws on many subjects. Our Congress is one of limited powers.

The States, too, have limited powers, limited by what they have given up to the Federal Government, and limited by many other parts of the Constitution, notably the 13th, 14th, and 15 amendments.

CLASHES INEVITABLE

Under the Constitution, the judicial power of the United States is given to the Supreme Court and the lower Federal Courts. It is inevitable that the Supreme Court in exercising this judicial power will come into clash with one branch of the Government or another—with the President when it invalidated the steel seizure in 1952, for example; with Congress, when it passes a statute beyond constitutional bounds; or with a State, as in the school-segregation cases.

But what the Court does is to decide the cases that some before it brought there by human beings, making claims to "equal justice under law," to use the phrase which is carved over the portal to the Supreme Court's building in Washington.

The Supreme Court does not sit to count votes. It is not its function to carry out the will of the majority. It is a fundamental basis of our governmental system that there are many things which a majority cannot do, and that there are many things on which the people of a State must yield to a greater national interest, as expressed in the Constitution. The Court interprets and applies the Constitution.

In doing so, its very purpose is, occasionally, to thwart the will of the majority of the people, either national or local. Without the Court our governmental structure would surely collapse. This is a task of the highest order. And it is obviously one which cannot be carried out with universal agreement or wholly in an atmosphere of sweetness and light.

PRECISION AMID IMPRECISION

2. Many laymen have the view that the law is somewhat like mathematics, a precise subject, where everything follows inevitably from premise to conclusion if one only has the capacity or the character to think straight.

Of course, mathematics is not like that, in many of its aspects. And that is surely not the way with the law. There are many principles, rules, and standards in the law. Legal training involves an understanding of these. It also involves considerable experience with the way the law has grown and developed over a period of many years.

This is obtained by the study of cases, the record of past decisions of courts, and of statutes and other legal materials such as treaties and administrative regulations and decisions.

One of the great things about our law, derived from the English common-law tradition, is that the judges of appellate courts are expected to formulate the reasons for their decisions in writing. This is a great stimulus to careful

thinking and expression, because the judge knows that his effort is going to be subject to the scrutiny of contemporary members of his profession and of history. It also provides an important means by which students learn the law and lawyers are enabled to advise their clients and other judges may guide themselves in coming to a decision.

But typically, and especially in cases that come before the Supreme Court, there is no one decision that is logically required.

Once I heard a Lord Chancellor of Great Britain say, at a meeting in Australia, that the function of the judge is to "follow loyally the decision which has already been come to."

QUESTIONS LEFT AMBIGUOUS

A judge of the High Court of Australia who was sitting beside me turned and said, somewhat impatiently: "That's no help to me. The cases that come to my court are there because there is no case in point, or in many cases because there are two or more lines of decisions which are claimed to be controlling. The judge's function is to choose. He doesn't give me any help in doing that."

So it is with our Supreme Court. Very rarely is decision there a simple matter of finding and following precedent. We would not need great men for judges if that were the case.

Sometimes questions are left deliberately ambiguous by the legislator, so that the Court is left to make the choice. Legislation is often a matter of compromise, and sometimes a compromise can be arrived at only if issues are not too sharply drawn.

For example, the basic question of whether or not the Supreme Court has power to declare an act of Congress unconstitutional is not specifically resolved in the Constitution itself. Yet it is clear that the problem was known to those at the Constitutional Convention of 1787, and must have been discussed by them.

To have attempted to make this matter specific might have wrecked the embryonic Constitution. Thus they left the question to the Supreme Court itself. When the Court decided the matter, left wholly open on the face of the Constitution, it was not legislating; it was performing the function that was assigned to it by the Constitution. Neither result was inevitable. The Court had to make a conscious choice. As Judge Learned Hand has pointed out in his recent Holmes lectures, the result was practically, though not legally, a necessary one.

The Court has similar problems to consider in many other areas under the Constitution. No State can pass any "law impairing the obligation of contracts." What is a contract for this purpose? Does it include a grant or charter? What sort of action constitutes an impairment?

Or, Congress has power to "regulate commerce with foreign nations, and among the several States." What is commerce? Is the power of Congress exclusive, or do the States have residual powers, at least until Congress has acted?

These, and many other questions like them, have occupied much of the time of the Court over a period of many years.

QUESTION OF DOUBT

Then there are the great and vague constitutional phrases like "due process of law," "privileges and immunities of citizens of the United States," and "equal protection of the laws." All of these phrases present ambiguities, questions of doubt and choice. It is the function of all courts to construe and apply these constitutional terms when they are involved in cases which come before them. But, in the nature of things, it is preeminently the functions of the Supreme Court to speak the controlling word.

And the fact that that word when spoken is not pleasing to one or more of the parties, or to a majority of the people of a State, or even to a majority of the people of the United States, is wholly irrelevant. The very purpose of a constitution is to restrict majorities, either national or local.

3. Finally, we may make reference to the problem which lies back of much of the present controversy about the Supreme Court. This is the decision first announced in 1954 through Chief Justice Warren, speaking for a unanimous Supreme Court in what are called the school-segregation cases.

Much of the criticism of the Court in connection with this decision has been on the assumption that the Court came to its conclusion out of the blue, that it

willfully and suddenly made up its mind to change what had always been the law, and that it thus needlessly and unwarrantedly upset the peace of the United States.

But law is not like that; and Supreme Court Justices are not like that. They have all taken an oath to administer justice according to law, and that is an oath which they take very seriously. The Justices are confronted with many problems, in each of which there is an area of choice. But they make their choice according to law, that is, in the light of the legal materials which are available.

PROCESS OF CHANGE

One of the things that one learns about law as he studies it and works with it is that law is a process. Decisional law, in particular, grows and develops, becomes more precise, or encounters change. The judges decide each case as it comes before them, doing the best, most thoughtful, and conscientious job they can in the light of the facts and their understanding of the law applicable to that case.

As individual cases are decided, it becomes apparent that the law has changed, or is in the process of changing. When this is clear enough, an earlier decision may be expressly overruled, either on the ground that it now appears that it was mistakenly decided in the first place, or that subsequent decisions have so undermined the premises on which it was based that it can no longer stand.

This process is the essence of the common law. It involves "making law" in a sense, but it is not "legislating." It is an essentially judicial process, an important function which courts have always carried out, and without which our legal system could not effectively function. To some extent it is a matter of trial and error.

To an even greater extent it is an illustration of the finest functioning of the human mind in the field of government, the constant searching process of striving to reach sound decisions through reason under law.

This is just what happened in the segregation cases. It is true that the Supreme Court in 1896 decided a case called *Plessy* v. *Ferguson*. This case did not involve schools but did uphold segregation in railroad trains; it gave rise to the "separate but equal" doctrine. A case in 1899, and one in 1925, applied this to schools.

But *Plessy* v. *Ferguson* evoked a notable dissent by the first Mr. Justice Harlan; and it sorely troubled the conscience of much of the Nation for more than 50 years. Even prior to that decision the Court had held that there could not be discrimination against Negroes on juries and grand juries. And slowly, as the 20th century progressed, other cases came to be decided which marked out a pattern hardly consistent with the *Plessy* case.

PATTERN OF EVOLUTION

It is not possible to go through all the cases here, but an indication may be made. In 1917, a unanimous Court, including Chief Justice White, who was a Confederate veteran, held that a Kentucky city could not enforce segregation in housing through a zoning ordinance. In 1938, the Court held that a State must provide a Negro a legal education within the State, and could not send him out to another State.

In later cases, in 1948 and 1950, the court held that Negro law students could not be excluded from State university law schools. Negro students have been going to the law schools of the Universities of Texas, Oklahoma, Arkansas, Virginia, and North Carolina, among others, under these decisions for many years—and for years before the cases involving the common schools were decided.

At the same time, a number of cases in the field of voting rights were decided, and the Court held, in several cases, that Negroes could not be excluded from primaries, even when this was sought to be done by various subterfuges and artifices.

In 1948 it was decided that private restrictive covenants, by which a purchaser of land agreed not to sell to a Negro, were unenforcible.

In the early 1950's, a number of cases decided that segregation in Pullman cars, in dining cars, and finally in any way on an interstate journey, was invalid.

All of this developed over a period of a good many years. Anyone who chose to look could readily see that in the normal process of development of the law

Plessy v. *Ferguson* had already been thoroughly discredited, and was clearly on the way out—as has happened to many other cases, including constitutional cases, in the history of the Supreme Court.

A TIME OF DELIBERATION

This was the situation when the school segregation cases came before the Supreme Court. The Court was aware of the problems and exerted extraordinary care and patience in coming to its conclusion.

The cases came to the Court in 1952, while Mr. Vinson was Chief Justice. They were argued extensively on December 9, 1952. Then the Court set them down for reargument, and put certain specific questions on which it asked the assistance of counsel. The cases were reargued on December 8, 1953.

It was at this point that Earl Warren had his first official contact with the problem. The Attorney General of the United States joined in a brief filed with the Court, and the Solicitor General participated in both arguments.

Finally, the cases were decided on May 17, 1954, nearly 2 years after they had been brought to the Court.

Even that was not the end of the Court's consideration. For the cases were set down for further consideration as to the decree which should be entered, and the decision on this, following the traditional equity practice of "all deliberate speed," was not announced until May 31, 1955.

All this indicated great deliberation, wise administration, and well-considered judicial conduct. But in the light of the decisions of the Court as they stood when the cases got there, the result was virtually inevitable. The Constitution prescribes "equal protection of the laws."

After some preliminary hesitation, notably in *Plessy* v. *Ferguson*, the cases had come to hold with great consistency that "equal protection" means equal protection. These decisions left the Court in 1954 with very little area of choice. To judges committed under oath to render "equal justice under law," it was evident that *Plessy* v. *Ferguson* had had a shaky foundation from the beginning and that it had already collapsed from the effect of the many other cases which had been decided in more recent times.

REVOLUTION RECOGNIZED

All of this may seem quite far removed from Chief Justice Earl Warren, and yet it is, of course, extremely close—as he would presumably testify with some eloquence if he were free to do so.

It was the function of the Court to declare the demise of *Plessy* v. *Ferguson*, and it fell to Earl Warren as the Chief Justice to be the Court's spokesman.

The opinion he wrote was short, simple, straightforward, calm, and clear. It did not make a revolution. It recognized that one had already occurred during the past half century of American national and legal growth. The opinion received the unanimous support of all eight of the Chief Justice's colleagues.

Anyone who was Chief Justice in 1954 would have been subject to intense criticism. Earl Warren had sustained this with dignity, grace, good humor, and with a certain distinction, which, though less Jovian, is reminiscent of Chief Justice Hughes.

For Chief Justice Warren is a warm, human man. He is friendly, genial, kindly. He has devoted most of his active life to the service of his fellow men in one capacity or another, and there are millions who have benefited by his actions, though most of them do not know it.

Even on the Court, Chief Justice Warren gives freely of his time and energy to public activities relating to the law and the administration of justice. He has brought about a reorganization of the Judicial Conference of the United States, and seeks to turn over to it supervision of some of the rulemaking functions of the Supreme Court. He has spoken at many gatherings of lawyers and others, and many of his speeches have been of real excellence, making a contribution to public thought which is much more than routine.

Justice Frankfurter has said that Chief Justice Hughes ran a "taut" court, while things were much looser under Chief Justice Stone. The situation under Chief Justice Warren may be halfway between.

Chief Justice Warren is gracious and easygoing in court, and one may assume that he is the same in the Court's conferences. He makes lawyers feel comfortable and at ease, makes them feel that they are really welcome, and that the

Court is glad—indeed, anxious—to listen to them. Yet he keeps things going. No one trifles with him.

Perhaps some might think that as a lawyer he is still feeling his way. Of course, a good lawyer is always feeling his way. Any lawyer or judge who is sure he knows the answers is pretty sure to be wrong.

A CALL TO EXPERIENCE

As I have tried to point out, there is in nearly every case before the Supreme Court an area of choice. How a judge marks out and determines that area largely determines the type of judge he is. In this area, most matters are ones of degree, ones of more or less. They are not black and white.

If a judge keeps this area too small, he is likely to be a poor judge, for he will be too hidebound by precedent, too much tied to the past, too unaware of the relevance of variations in the situation now before him.

On the other hand, if a judge allows this area to be too broad, he is not likely to be a good judge. He may run some risk of deciding according to his own personal choice rather than according to law as he is given light to understand the law; he may give too little weight to precedent, and make the law unsettled.

Most judges successfully avoid these extremes. Even then, there is an area of choice. That is what judges are for. Within this area, it may not be possible to give a purely logical demonstration that one result is better than another. A judge has to call on all the resources of his experience and wisdom in coming to a conclusion. Some judges hew rather closely to the line; some are more free wheeling.

It might be thought by some that Chief Justice Warren keeps the area of choice rather broad, and that perhaps he would be a better judge if he narrowed somewhat his scope of choice.

This has nothing to do with the segregation cases, where the choice had already been narrowed by prior decisions almost to the vanishing point. It may have some application in the general run of cases.

Chief Justice Warren is not Governor Warren. When a man puts on judicial robes, it does something to him if he is really a lawyer and a man. But Chief Justice Warren may sometimes look at things with the relatively broad view which was relevant when he was considering matters as a Governor and which has little or no place in the deliberations of a Justice of the Supreme Court. It may be that he has not always used as sharp a tool as is needed in the decision of certain types of technical matters.

Earl Warren is a humble man. He is disinterested. He sincerely seeks to find his way, in words which Justice Frankfurter used in describing some of his predecessors as Chief Justice, "through precedent, through policy, through history, through their own gifts of insight to the best judgment that poor fallible creatures can arrive at in that most difficult of all tasks, the adjudication between man and man, between man and state, through reason called law."

Senator DODD. My reason for reading it and citing it is that I think it will be difficult to reconcile it with that paragraph of yours on page 6 of your statement.

I have asked other witnesses about this same point. I hope it makes clear that there is another view here.

I notice you have cited the situation with respect to Alaska and Hawaii. Wouldn't you agree that the statute to which you referred is subject to constitutional restraints?

Mr. MORROW. Yes, sir. I would. I do not think that the statute, as any other statute of Congress—it is an admission act and I do not know that an act of admission has any greater stature than some other proper act of Congress. I do not quarrel at all, Senator Dodd, with what I regard as a constitutional power of the Supreme Court. You and I may disagree in connection with that, but simply the basis of my belief is, and this is an inaccurate statement if you think I am speaking of the earlier decisions, I was talking here about the decisions that I had mentioned in this article.

Senator DODD. No. I understand your view. The reason I want to make it clear is that I think people in this country, on reading a statement such as you have made with reference to the admission of Hawaii and Alaska, may very well receive the impression that these two new States have received special status or exemption from the decision of the Supreme Court with respect to this problem of Negro and white children having equal access to the schools, and that is not so.

Mr. MORROW. I do not suppose the admission acts have ever been before the Supreme Court on that question at all, and therefore I imagine when they come before the Supreme Court, they will act on them.

Senator KEFAUVER. Of course, when Texas was admitted, the Supreme Court said they came in on equal footing with any other State.

Mr. MORROW. That is right,[1] but I would not have you believe that I would in any sense misquote any of this.

Senator DODD. No. I did not mean that. I only meant that we ought to make it clear that they have no special status.

Mr. MORROW. I do refer here, though, in that paragraph that you mentioned, the decisions I speak of where declarations of the present members of the Court. My feeling about it, Senator Dodd, may be expressed in about this language, if you will permit me this viewpoint.

Here is a body of decisions which has been left alone. I do not mean to say it has not been encroached on, as you suggest, but it has been left alone as a specific matter, and it seems to me it is a very strong argument that the Congress over all these years has not seen fit, as Judge Hand says, to do anything except to let the matter go along as the Courts have held, even in the District of Columbia. I can't really voice it any stronger than Judge Hand or Chief Justice White, to whom he referred. I quoted him in the last sentence of my article, his view about the office of the Court. It is just a question in my mind whether it is the Court or legislative body.

Senator DODD. Well, I was going to ask you a question I have asked other witnesses. Would you agree with me that if the Talmadge amendment is adopted, we will not only reverse the decision of the Supreme Court in the *Brown* case in 1954, which requires equal facilities, but we will also reverse the 1927 case. We will also reverse the *Plessy* case in 1896, which established the doctrine of separate-but-equal. We will also, for practical purposes, repeal the 14th amendment and, in fact, we will be back in 1860.

Now, my question is, would you like that situation to prevail?

Mr. MORROW. I do not follow your position about that. I have heard your discussion before with these other witnesses.

The 14th amendment was interpreted in 1896 for the first time, if that is the date of the *Plessy* case. The 14th amendment was a part of the Constitution prior to that time.

Senator DODD. Yes.

Mr. MORROW. Since 1868. It was interpreted in 1896 and again in 1927.

Now, this amendment, if it passes and becomes a part of the Constitution, would, as you indicated in your questions before, give each State the right to control its public school affairs exclusively. Each

[1] See app. D for supplemental statement by Mr. Morrow on this point.

State would have the right to determine what its method could be, but I do no have the same view that you seem to have with respect to the frightening conditions that might exist, because I thought for a good many years the country got along pretty well under the older doctrine.

Senator DODD. That may be so, but my point is, would you agree with me that at least we will be back there?

Mr. MORROW. No, sir. I do not think I can follow that viewpoint. I have thought about your questions before, and I do not think I can follow your viewpoint. The 14th amendment was interpreted. It was a part of the Constitution. It will remain a part of the Constitution, whatever happens here.

Senator DODD. Yes, but let me interrupt you.

Mr. MORROW. But it would not be repealed.

Senator DODD. Let me show you why I think you are in error. With respect to the field of education, if this amendment is adopted, the Supreme Court will have absolutely nothing to say. It could not have issued the doctrine of "separate but equal" in the *Plessy* case in 1896.

Mr. MORROW. I do not see that there is anything in the 14th amendment that relates to education. I am proposing the amendment because the court has so interpreted in the *Brown* case.

Senator DODD. That is the law now. That is why you are opposing it.

Mr. MORROW. I am opposing it because I think it ought not to be in, because I believe it is wrong, and I think the amendment ought to be adopted.

Senator DODD. Are you seriously saying you don't think we will be back in a status without any power residing in the Supreme Court with respect to questions involving education?

Mr. MORROW. No, sir, I do not share that view.

Senator DODD. Then we agree. We would be back there.

Mr. MORROW. No. I do not share the view that we would be back there.

Senator DODD. Well, where would we be under this amendment, if not there? The States would have absolute power and the Federal Government would have none under this amendment.

Mr. MORROW. Well, I think that is what Chief Justice Taft thought ought to be done, and I think I quoted his language. I think Hughes said the same thing in the case you read.

I do not think there is anything wrong in the States having the right to control education.

Senator DODD. That is not my question. I am asking you if you would agree with me that we would be back there, right or wrong.

Mr. MORROW. No, sir; I cannot agree with you.

Senator DODD. We would be back there.

Mr. MORROW. I cannot agree with you that we would be back there right or wrong.

Senator DODD. Well, where would we be?

Mr. MORROW. We would be in a position where the States would have authority under this constitutional provision to control their educational functions.

Senator DODD. That is what I am suggesting. You and I do agree. That is where we would be. There would be no power at all in the Supreme Court to pass on questions of this kind. It would reside wholly in the States and the political subdivisions of the States.

Mr. MORROW. Well, I take it that action under such an amendment might come before the Supreme Court, just as actions of the Congress in connection with other acts might.

Senator DODD. I understand that, but I do not see how you can disagree that we will be back where the States have absolute power.

Mr. MORROW. The States will have the power to determine the educational functional of their educational institutions, or whatever their language is.

Senator DODD. If we can agree on that, I want to ask you a question: What would prevent any State from having a rule or regulation requiring some qualification of students with respect to religion? Do you think that should go on in this country?

Mr. MORROW. No; I think other provisions of the Constitution would guard against that.

Senator DODD. Well——

Senator KEFAUVER. Which ones?

Mr. MORROW. Well, I can't name it to you, but I am positive that in connection with the Constitution, the right of religion couldn't be dispossessed.

Senator DODD. Well, we have this question before the Supreme Court involving public education. You remember the case in Illinois. There a board of education established a program under which clergymen could come into the public schools and teach religion. So this is not as farfetched as my question might first appear to be. A person in Illinois instituted a suit, a taxpayer's suit, to stop this practice. The plaintiff was a woman whose son was a student in the public school system of Illinois. The Supreme Court finally said this is wrong and it is a violation of the Constitution.

Now, you say this would not happen, but it did happen, in a sense, and it took our Supreme Court to stop it under the doctrine of separation of church and state.

Now, what I am worried about is, and I think other people are similarly worried, if it took our Supreme Court to stop this practice in Illinois not very long ago, what do we face if we turn this all back to the States again? And I think the record will show that there are considerable grounds for our worry.

Mr. MORROW. Well, Senator Dodd, the best answer I can make to that is, I believe, I have to assume that the legislatures of the States and the authorities of the States to whose authority this would be committed under this amendment would not be going to frightening conditions. You know, after all, this thing went on for a long time, and——

Senator DODD. I know it did.

Mr. MORROW. There hasn't been any great deprivation.

Senator DODD. In your own statement you made the best answer that could be made.

On page 3, you quoted Thomas Jefferson. He said:

> In questions of power let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution.

That is precisely my point.

Mr. MORROW. I think that also applies to men on the Supreme Court.

Senator DODD. Well, that is right. It applies to everybody, but if you are going to abandon the Constitution with respect to these great questions, you are reposing your confidence in man, saying these things will not happen. But they have happened time and again and, I think this would be one of the very real consequences of the adoption of this amendment.

That is all I have, Mr. Chairman. I have another subcommittee and I am overdue. If you will excuse me, I would like to go there.

Senator KEFAUVER. I understand, but I am sorry you have to leave.

Senator DODD. Thank you very much.

Mr. MORROW. Glad to have the opportunity to talk to you, Senator Dodd.

(At this point in the proceedings, Senator Dodd left the hearing room.)

Senator KEFAUVER. Let me see if I get your attitude about this straight, Mr. Morrow.

You referred to the Missouri case in which there has been a Negro student who wanted to study law and the plan of the State to send him to another State and pay his tuition. That is the *Gaines* case, and they had to offer him separate but equal facilities in his own State or admit him to the University of Missouri.

If this amendment were enacted, what would happen in a case like that?

Mr. MORROW. I suppose, Senator Kefauver, that if this amendment became a part of the Constitution, that the matter of determination of whether or not a man was being fairly treated under either the "due process" clause or the "equal protection of the laws" would properly come before the Supreme Court if simply a matter of whether or not a man had to go out of the State to get an education.

In other words, they would probably hold that the Constitution of Missouri, insofar as it so provided, was unconstitutional, as has been done in several States already. But, so far as the recognition of the rights of the Negro and the white, I think the attitude of the Missouri legislature or those in charge of Missouri would have to be determined by their laws, their regulations.

The reason I say that, if you will permit me——

Senator KEFAUVER. Let me see if I get this straight. I thought that the other witnesses have said that, insofar as the matter of education is concerned, the 14th amendment would have no application.

Mr. MORROW. I have heard them say that.

Senator KEFAUVER. Do you feel that? Do you agree with that?

Mr. MORROW. I don't have that exact same view. I have tried to express it. I may not be very clear in my expression—evidently not.

The 14th amendment is part of the Constitution. The Court in *Plessy* v. *Ferguson*, supra, interpreted the 14th amendment and continued to interpret it and interpret it. But the 14th amendment, it doesn't seem to me, is necessarily the originator of the question of right or wrong on the questions of white and black children.

It is the, for instance, the Supreme Court in this *Bolling* case that goes back to the 5th amendment and the "due process clause" in stating that, evidently believing that, the 14th amendment couldn't apply. The fifth amendment did. It was passed in 1791, and therefore I

cannot conceive of the reason myself. But I thought the decision in the *Bolling* case indicated principally to me that the 14th amendment had no application to the origination of the right of whether or not the education of a man was separate but equal. It is a constitutional provision which was used by those who said that they were denied this right, and the Court held in interpreting it that they were not denied any right by virtue of the 14th amendment.

Senator KEFAUVER. Do you think that *Plessy* v. *Ferguson* would be the law and would have any application if this amendment were adopted?

Mr. MORROW. I think *Plessy* v. *Ferguson* would be reestablished as sort of a precedent, looked at as a precedent. But I do not believe *Plessy* v. *Ferguson* would actually become the law unless it was followed by some decision, reinstated, I mean. I hardly see how you could do that. It would be an overruling of the *Brown* case.

Senator KEFAUVER. Well, *Plessy* v. *Ferguson* is, of course, based on the 14th amendment; the court said that "separate but equal" satisfied the requirements of the 14th amendment.

Mr. MORROW. You see——

Senator KEFAUVER. I think Senator Sparkman, and possibly Senator Talmadge, said that this would take the application of the 14th amendment completely out of the field of education and return education entirely to the States. So I wonder how you believe that *Plessy* v. *Ferguson* might still be applicable?

Mr. MORROW. I must say that I do not suppose I should compare my views with either of the two Senators you named, but the 14th amendment was not the basis, any more than the 5th amendment, of the right of a man to be treated fairly under the Constitution of the United States, if it was a discriminatory thing. But the 14th amendment was the one which, of course, came during the reconstruction period. And when the Negro in the *Gaines* case, or others, thought he had been mistreated and unfairly handled, he raised the question and the court, in interpreting the 14th amendment, held that it negatived, that there was nothing in the 14th amendment that was contravened by this action.

As Justice Taft said, the decision is within the discretion of the State in regulating the public schools and does not conflict with the 14th amendment.

It is that it does not conflict with the 14th amendment at all.

Senator KEFAUVER. Do you think that States ought to be able to decide exclusively or should a school district be able to decide that they can have schools only for children of one race and not for the other, or one religion and not for the other?

Mr. MORROW. I do not share the religion end of it, but I say, I tried to say a while ago that I thought in 75 or 80 years that this country got to be a pretty great country under that doctrine and did pretty well under the doctrine of the States having the power, as decided by Taft and his people.

I am not too much afraid; I do not believe I am quite as afraid of the possibilities as you gentlemen are, who may be much more experienced than I.

Senator KEFAUVER. In considering any constitutional amendment it is very important to find out its exact meaning.

Mr. MORROW. I share your views.

Senator KEFAUVER. And it is a very serious matter.

Mr. MORROW. It is, indeed.

Mr. FENSTERWALD. Might I ask one question, Mr Chairman?

Senator KEFAUVER. Mr. Fensterwald.

Mr. FENSTERWALD. I have been looking for a letter which the subcommittee had received, but I have not located it. We received a letter, however, and among other things, it stated the possibility that this amendment, if adopted, might weaken the 10th amendment, which reserves rights to the States and to the people. The theory was that the Talmadge amendment, by specifying one particular right would, by implication, weaken other rights.

Do you feel that this is a well-grounded fear? Or do you feel that the Talmadge amendment would have no effect on the 10th amendment?

Mr. MORROW. I can see, Mr. Fensterwald, how they could make this statement, because this particularizes on the educational feature. But I do not believe I would share the view that it would necessarily weaken the 10th amendment, because at least it would be an exception or cumulative, one way or the other, which ever way you want to take it; but with respect to the 10th amendment that this is a reaffirmation that the exclusive rights of schools, in handling the public schools, would be within the States.

The language of the 10th amendment—and that is where I do not think I make myself clear to Senator Kefauver—is that there is nothing in the Constitution or the 14th amendment that says the schools shall be handled in a certain way, the public school system. It is based on a general proposition.

I can see, though, where people would say that the 10th amendment might be affected by such a declaration because it would be an exception, a special exception, singling out public education.

But there is no grant of power in the Constitution anywhere that I know of to the Federal Government to control the public schools. And consequently, the 10th amendment, which reserved all powers not so granted, is a very broad and effective amendment. It has, to some extent, lost its power and some of its use already. Practical matters. But I can see the point that you raise.

Senator KEFAUVER. No, education is not mentioned anywhere in the Constitution as far as I know.

I do not think I saw the letter, to which counsel refers, but I saw an article to the same effect somewhere. I think the reasoning was that, if you made an exception in this case, you might have to admit exceptions in other cases.

Mr. MORROW. I guess that is true, Senator. And, of course, it would be a very irksome test to undertake to enumerate the various powers that they claim they withheld and did not grant if you define them individually.

Senator KEFAUVER. Mr. Chumbris, on behalf of Senator Langer, do you wish to question the witness?

Mr. CHUMBRIS. I think that there are some very fine constitutional points here that you have raised, Mr. Morrow, especially in view of the questions which you were just asked. And for the legislative history, I would like to ask you a few questions.

Now, perhaps some of the most disputed cases in the Supreme Court has been a battle between the 10th amendment and the interstate commerce clause.

Mr. MORROW. Yes.

Mr. CHUMBRIS. Under the Constitution; whether you should impede products going across a State line or whether you should reserve the State police power to keep certain articles out of the State and let the police power of the State control what should come in and what should stay out. For instance, the oil cases and the milk cases are perfect examples of that conflict of those two constitutional powers.

If this amendment is put in the Constitution, would it be your interpretation that it would be a separate constitutional amendment on its own?

Mr. MORROW. Yes, I think so. I think that it is an addition, somewhat like the 18th amendment was.

Mr. CHUMBRIS. Then if this amendment is on its own and if this amendment is an amendment separate from the 10th amendment, which gives the States a specific power as to education, would you say then that——

Mr. MORROW. Must mean—excuse me—a reservation.

Mr. CHUMBRIS. That is right, a reservation.

Senator KEFAUVER. It does not specify education, of course; it just specifies a general reservation.

Mr. CHUMBRIS. But this new amendment would say that the States do have the power to administrative control over the public schools.

Mr. MORROW. Sure.

Mr. CHUMBRIS. Then what would be your view if there was a clash between either the fifth amendment—it would not be the fifth amendment in this case, it would be the 14th amendment that pertains only to the States—and this new amendment as to whether there was equal protection under the Constitution?

Mr. MORROW. I believe that question, if I understand it correctly, relates to the same question that Senator Kefauver and Senator Dodd were asking about the 14th amendment.

Mr. CHUMBRIS. Yes.

Mr. MORROW. I have tried to say the 14th amendment is a part of the Constitution, whether the Southerners believe it should be or not. In the *Plessy* v. *Ferguson* case, the Supreme Court interpreted the act of preventing the white and Negro children going to school together as not in contravention of the 14th amendment.

You see, the 14th amendment had no application or was not in violation of it; so that, negatively, they did not say the 14th amendment created that right; they said that the 14th amendment was not violated by that right.

Consequently, it never has been my idea—and, of course, I can certainly be wrong—that that was creative of a right.

The 10th amendment reserved to the States every power not delegated to the Federal Government. There is no mention anywhere of any delegation of authority to the Federal Government on educational matters anywhere in the Constitution. Consequently, it must be a reserved power. So as I see this amendment, if it becomes adopted it will be effective to give to the States the control in the handling of their separate educational facilities.

I cannot say that Senator Dodd, Senator Kefauver, and counsel for the committee are not, maybe, primarily concerned with respect to what may happen; but I just cannot get over the fact that we got along awfully well for a lot of years and this country became about the biggest Nation in the world under a doctrine which now has been condemned. And I just do not share the view that we are going to run into any great difficulties.

As a matter of fact, I would like——

Senator KEFAUVER. Well, it was always considered, though, that we had the doctrine of *Plessy* v. *Ferguson*.

Mr. MORROW. Yes, sir.

Senator KEFAUVER. That was actually in force from the time of the *Slaughter-House* cases in 1873.

Mr. MORROW. That is right. And the Congress so regarded it, because they took no position to the contrary, even in the District of Columbia.

Mr. CHUMBRIS. I am more interested in what this new amendment will do in the field of education in regards to the equal protection of the laws.

Now, following Senator Dodd's example, let us say that in one of the States—and it does not have to be a Southern State; let us say a far western State, Nevada, any of them, Utah, Colorado—the school board decides that it is going to place students as to their religion rather than as to their race.

Mr. MORROW. I believe the "separate" constitutional provision would protect it against——

Mr. CHUMBRIS. Which constitutional provision? There is none. Article I on religious freedom does not apply. All article I says is that the Congress shall pass no law——

Mr. MORROW. No law.

Mr. CHUMBRIS. Which will establish a religion, nor do anything that will give preference of one religion over another.

You are, by this constitutional amendment now giving the State—any one of the Western States; I am using them as an example—the right to do as they see best, as they see fit in their particular States.

Now, where would be the constitutional protection there?

Mr. MORROW. I presume that the constitutional protection might come either under the fifth amendment or equal protection of the laws, either one of them.

Mr. CHUMBRIS. Of course, the 5th amendment goes to what the Federal Government does, and the 14th amendment goes to what the States do.

Mr. MORROW. That is right.

Mr. CHUMBRIS. So there is a distinction. So they would not be protected under the amendment.

Senator KEFAUVER. Do you want to think it over, Mr. Morrow, and give us your full opinion of it? I think that is an important point.

Mr. MORROW. Well, yes, I will try to do so.

I should like to do so, Mr. Chairman; there is an article written by a Virginia judge recently that I had every intention of bringing with me and asking that it be incorporated in this statement, which undertakes to state what I regard—and if it please you, I have sought to talk about what I regard as judicial restraint of the Supreme

Court. And this article by a Virginia judge says it much better than I seem to be able to do. And I would like to have the opportunity to send it to you and let it be a part of the record.

Senator KEFAUVER. We will be glad to have it and make it a part of the record.

(The above referred to material was not received by the subcommittee.)

Mr. CHUMBRIS. Now, Mr. Chairman, just one more word on that particular point. Do you think this suggested amendment could have any additional words which may——

Mr. MORROW. Prevent, allay the fears that you have expressed with respect to the matters here?

Mr. CHUMBRIS. That is right.

Mr. MORROW. Why, I do not say—of course, I had nothing to do with writing the amendment. The idea that I have had is that the amendment would put back in the States the authority which had been vested in the States and not given to the Federal Government, under a long body of decisions of the Supreme Court. And I have no actual say about the act's actual language. If the language is inappropriate, I am sure the members of the subcommittee and the whole committee will study that very carefully and seek to protect any injustice that might come by virtue of that, of their position.

I saw the amendment, of course, in the resolution proposed by Senator Byrd and Senator Talmadge and these other gentlemen.

Mr. CHUMBRIS. Thank you, Mr. Chairman.

Senator KEFAUVER. Thank you very much, Mr. Morrow.

Mr. MORROW. Thank you very much, Senator. I appreciate it very much.

Senator KEFAUVER. You send that article to us and we will put it in the record, and if you want to file a supplemental statement with reference to this problem of the matter of religion that you spoke about——

Mr. MORROW. Well, I should like to. I should like to express my views on it. I do not think I have given it too close a study on that particular subject. But, anyway, I appreciate the opportunity. I will not be home for several days, but I guess it will be all right for me to send it in?

Senator KEFAUVER. Yes.

Mr. MORROW. Thank you very much, sir.

(The supplemental statement which was subsequently received is as follows:)

SUPPLEMENTAL STATEMENT OF WRIGHT MORROW

Mr. Chairman, you gave your consent to the filing by me of a supplemental statement in addition to the testimony that I gave before the subcommittee heretofore.

I particularly requested the right to place in the record the statement which I regard of great importance and significance made by Hon. Brockenbrough Lamb of the chancery court of Richmond, Va., in which this distinguished jurist discusses the problem of the restraint of the judiciary and the danger that a judge forgets that he is not a depositary of arbitrary power but a judge under sanction of the law.

The following quotation is from Judge Lamb, and is reprinted from the July 1958 Journal of the American Bar Association:

"And now a serious word. What I shall say is but a recurrence to a fundamental principle, founded upon that truth which if known shall set us free. Upon adherence to this canon of judicial conduct the vitality of our cherished

liberties depends; for otherwise the doctrine of State sovereignty, right to trial by jury, freedom of speech and of religion—in short, all that we have hardly won and hold dear—become as sounding brass or a tinkling cymbal.

"The greatest hazard a judge faces is not from without. The gravest danger, the most constant and appalling danger, lurks within the judge himself. It is what the judge would call his conscience, what others refer to as his preconceptions or his predilections—and what those who disagree with him denounce as his prejudices. By and of these dissimilar names it is the same identical thing. The difference is in the viewpoint.

"I refer to what Chancellor Wythe had in mind when he said: 'compassion ought not to influence a judge, in whom, acting officially, apathy is less a vice than sympathy.' This expression from the pen of a great philosopher in the law is cited by the elder Burks in *Harris* v. *Harris* (31 Grat. 32). In the course of his opinion in a heartrending case, Judge Burks says:

"'The unhappy condition of the appellee excites my commiseration; but courts of justice are not allowed to be controlled in their decisions by considerations of that character.'

"He then quotes Chancellor Wythe's eloquent words above.

"The crying need for this kind of judicial perspicacity and courage, in these times that are so badly out of joint, justifies the repetition of what should, in truth, be recognized as a platitude:

"'We regret that the conclusion reached will prevent a recovery and may thereby defeat the ends of justice in the particular case before us, but however that may be, we must declare the law as we find it written and comfort ourselves with the confident belief that in its results it will promote the ends of justice to all.'

"The thought I am endeavoring to express is embodied in the Canons of Judicial Ethics (194 Va. clxii) in words that pull no punches. Quoting from canon 20: We have a 'government of law and not of men,' and a judge 'violates his duty as a minister of justice' (strong language, is it not? It is not mine. It is quoted from the canon)—'violates his duty as a minister of justice if he seeks to do what he may personally consider substantial justice in the particular case and disregards * * * the integrity of the system of the law itself.' This canon cautions a judge to remember that he is 'not a depositary of arbitrary power but a judge under the sanction of law.'

"It would be well if the emphatic language of this canon and the striking words of Chancellor Wythe were engraved over every bench in the Commonwealth, and in other sections of the Union as well.

"The inscription over the portal of the Supreme Court of the United States refers to that edifice as the temple of 'justice under law'. That inscription can but mean that there is, for a court or a judge acting officially, no other justice than that defined by law. Unless the words mean this, they mean nothing. Since we have a government of law and not of men, there is no such thing for a judge acting officially as 'justice,' save only as it is found in and defined by the law.

"The concept, now apparently prevalent, that the justice administered by the courts is a thing existing apart from the law, may have it roots in the ancient Latin maxim: 'Fiat justicia ruat coelum'—let justice prevail though the heavens fall.

"The translation of the Latin 'justicia' into our modern 'justice,' considered as an ideal thing apart, is a mistranslation. 'Justicia' to the Romans was their system of law, for the enactment and administration of which they had a gift that is not surpassed in recorded history.

"And yet I apprehend, in view of current developments, that justice is all too often administered in accordance with the individual conceptions of judges of morality, psychology, sociology and ethics. Irrespective of the motive, whether good or bad, the result is tyranny; the definition of a tyrant is one who is 'unrestrained by law or constitution; a usurper of sovereignty.' May we ever retain our capacity to detect it from afar 'down every tainted breeze.'

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"The continued violation by us as judges of this basic principle will make our judiciary another Samson, blind to duty and swollen with power, pulling down the pillars that support our most cherished institutions."

I cited the case of *Missouri ex rel. Gaines* v. *Canada*, (305 U.S. 337). I gathered from the questions during the hearing that it was not thought this decision upheld my position concerning the interpretation of the 14th amendment. I quoted from language (page 344 of 305 U.S. Reports) wherein Chief Justice Hughes fully recognized and cited with approval the *Plessy* case, the *McCabe* case, the *Gong Lum* case, and the *Cumming* case. The Court recognized the separate but equal doctrine and stated that the State court had recognized the obligation of the State to provide Negroes with advantages equal to that afforded to white students. The decision turned on the finding by the Court, as a matter of fact, that the method used by the State of Missouri requiring resort for the proper education to another State was not within the doctrine of separate but equal. If the facilities afforded has been equal, although they were separate, the result of the case would have been different, because the court was upholding the separate but equal doctrine.

Another part of our discussions was the reflection of the ideas of some of the members of the subcommittee that the adoption of this proposed amendment would do away with the 14th amendment, and possibly weaken the 10th amendment. I said in my previous testimony I could not follow that idea. The 14th amendment, as was stated in the *Plessy* case, was to enforce the absolute equality of the two races before the law, but had nothing to do with education. This amendment was a restriction on the powers of the States.

In the old case of *United States* v. *Stanley* (109 U.S. page 3) the Court was passing on an act of Congress entitling all persons within the jurisdiction of the United States to the full and equal enjoyment of advantages and facilities such as public conveyances, theaters, etc.

Mr. Justice Bradley in writing the opinion for the Court, said:

"The 14th amendment does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation or State action of the kind referred to * * *. Positive rights and privileges are undoubtedly secured by the 14th amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges and by power given to Congress to legislate for the purpose of carrying such prohibition into effect * * *.

Then a case referred to by Chief Justice Taft in the *Gong Lum* case, namely, *Roberts* v. *Boston*, (5 Cush. 198), in which the Supreme Court of Massachusetts was passing on a State provision requiring separation of colored and white children, Chief Justice Shaw of that court, in replying to the argument of Mr. Charles Sumner that all persons without distinction of age, birth or color are equal before the law, said this:

"But when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security."

In the *Roberts* v. *Boston* case, the court held that special schools might be established for children of different ages, sexes and colors and for poor and neglected children, who have become too old to attend the primary schools and yet have not acquired the rudiments of learning to enable them to enter the ordinary schools, and that similar laws had been enacted by Congress under its general power of legislation over the District of Columbia.

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So in response to the suggestions made by members of this subcommittee that the adoption of this amendment would destroy the decision in the *Plessy* case—that is, the separate but equal doctrine and would in effect repeal the 14th amendment and go back to the year 1860, I simply do not follow that line of argument.

As stated above, the 14th amendment was restrictive on the powers of the State. The 10th amendment had reserved all powers not delegated to the Federal Government to the States and the people. So, when the *Plessy* case came before the Court, the petitioner was complaining of being required to ride in a separate coach on a railroad in Louisiana because he was a Negro and was not allowed to ride in the same coach with white people. The Court, in passing on this question, interpreted the 14th amendment and negatived the idea that this character of treatment was a discrimination, and negatived the idea that such was in violation of the 14th amendment.

Again, when the Court was called on in 1927 to pass on the *Gong Lum* case, where the Chinese girl was not allowed in a white school, Chief Justice Taft said that it was the same question which had been many times decided to be within the constitutional power of State legislatures, without intervention of the Federal Court under the Federal Constitution, and that the regulation of the education of its youth was within the discretion of the State. Therefore, the 14th amendment was in no sense violated.

The same Congress that passed on the 14th amendment also passed several school laws. In July 1866, Congress passed an act setting up schools for colored children in the District of Columbia. Again, the same month of 1866 another act was passed which granted to the trustees of colored schools for the city of Washington and Georgetown in the District of Columbia, for the sole use of schools for colored children, certain property therein described.

Again, after the 14th amendment had been declared ratified in 1868, there was a great deal of discussion in Congress on certain civil rights bills, particularly one by Senator Sumner, of Massachusetts. The record of such discussion shows unequivocally that it was the belief of the Senate that it was an unconstitutional measure. Effort was made by Senator Sumner to specifically provide for integrated schools and other similar matters without any recognition of the difference in race or color. This effort was defeated by a substantial vote and many Senators expressed the view that such an act would be unconstitutional. They certainly did not think that the 14th amendment was applicable, and Sumner was one of its framers.

In this debate the *Roberts* v. *Boston* case was often referred to and it was argued with effect by those opposing the Sumner bill that colored people stood precisely where it was claimed they stood under the 14th amendment which had just recently been passed. They said the question of education must be left to the discretion of the officers who administer the system and not by the Federal Government. It was argued that such an effort "was a singular interference, undoubtedly, with the social rights of the people which was never contemplated in the Constitution."

So, I say, if this amendment should be adopted, the original intent of those who wrote the 14th amendment would be reinstated; the 10th amendment is reinvigorated, so to speak, because there was never any delegation to the Congress of any power or right to regulate the education of the people of the States. It was an exclusive function reserved to the States and local governments. It was so decided in the interpretation of the 14th amendment and was so long and consistently regarded that it became a part of the life of the American people.

I cannot concede at all to the arguments made during the discussion that the adoption of the amendment would lower the standards or would restrict educational opportunities or cause religious or economic discrimination. For more than 80 years—for half the life of this Nation—after the Civil War, the States regulated their schools in a constitutional manner and during this period this great country became the most important nation in the world. I think the fears expressed by some members of the committee could be based on nothing but a fanciful viewpoint.

In the South, where I live, the adoption of this amendment would mean a great improvement in the relations and good will that has existed between the races, which has been tremendously damaged as a result of the decision of the Supreme Court in 1954.

At one point in the discussion it was mentioned that my testimony on page 6 where I used the words, "these decisions" was interpreted to mean the decisions leading up to the 1954 decisions. I undertook to correct this at the time. "These decisions" that I refer to were the *Brown* case and companion cases in 1954. I agreed then and now with the distinguished Judge Learned Hand that the Supreme Court is undertaking to be a third legislative chamber and, as said by Judge Hand, "if we do need a third legislative chamber, it should appear for what it is and not as the interpreter of inscrutable principles."

In the discussion of the Admission Acts of the States, wherein certain States have been given exclusive authority and control of schools, we emphasized that in these instances the intention of Congress was demonstrated without doubt. While the Acts of Admission of States into the Union would be subject to judicial review, it would be very difficult to understand how any substantial part of the provisions of admission could be repealed or dispensed with. In any event, it cannot be denied that Congress demonstrates its plain intent in the passage of these Acts of Admission.

The situation as to my own State of Texas was not involved here, but in the discussion a statement was made by one of the members of the subcommittee that Texas came into the Union on equal footing. I did not desire to debate this subject at the time; however, I cannot let the matter stand without expressing my views.

Texas desired annexation from its beginning and it was voted upon favorably by the Texas electorate when they adopted the first Constitution of the Republic. In 1838 a proposal was made for membership in the Union, but President Van Buren promptly disposed of it and said:

"The question of the annexation of a foreign independent state to the United States has never been presented to this Government. Texas is a State with an independent government recognized as such by the United States. * * *"

When this reply was received by the Texas Congress, a joint resolution was adopted in January 1839, withdrawing the proposal of annexation. The opposition made four arguments—first, possible war with Mexico; second, it might extend slave territory; third, would saddle the Government with the Texas debt, and fourth, Congress had no power to annex an independent nation.

Subsequently in 1839 and 1840, Belgium and Holland recognized Texas as an independent nation; and in June 1842 England sent an Ambassador to Texas. This condition reactivated sentiment for annexation in the United States. Andrew Jackson, who had recognized Texas as an independent government on the last day he occupied the Presidency, became worried about the possibility of England getting "an iron hoop about the United States." Sam Houston was doing everything he could to be sharp sighted and wary in his dealings with England while he really desired above everything else that Texas should become part of the United States.

It appeared that President Tyler, twice in 1843, had indicated his desire to reopen the question of annexation. On April 12, 1844, a treaty between the United States and Texas was signed and President Tyler laid it before the Senate with a message urging its acceptance. By this treaty Texas ceded all public lands, minerals, etc. to the United States and the United States, in turn, assumed and agreed to pay the public debts of Texas estimated at about $10 million at that time. Though advocated by President Tyler, this was defeated in the Senate by a vote of 35 to 16. Texas has been rebuffed then twice, but the political situation in 1845 became more propitious and here it was that Andrew Jackson, almost at the end of his days, but fervent in his desire to push through this annexation, helped cause the nomination of James Polk upon a platform of "Oregon and Texas." Polk was elected with the help of Jackson, who caused President Tyler to withdraw as an independent candidate. Then a final resolution for annexation of Texas was immediately placed before Congress and Mr. Polk immediately went to Washington to help President Tyler put it through. Jackson still valiant in his efforts, put everything he had behind the movement and the resolution was adopted and President Tyler signed it on March 1, 1845, 3 days before Tyler's term expired.

The provision in the earlier resolution where Texas ceded all of its vacant lands was deleted, and Texas retained all the vacant and unappropriated lands lying within its limits, and applied the same to the payment of its own debts and liabilities. Thereby Texas kept her lands and paid her debts, and the Senate and the House of the Texas Republic acted on June 23, 1845, providing a consent on the part of the Government of Texas on terms, guarantees and conditions set forth in the preamble to this joint resolution. Finally, the Congress of the United States, on December 9, 1845, passed a joint resolution recognizing the acceptance by Texas and formally admitting the State to the Union.

A very recent decision of the present Supreme Court in a 5 to 4 decision written for the majority by the newest Justice, Potter Stewart, decided March 9, 1959, in the case of *Emanuel Brown* v. *The United States*, the Court uses language which I regard as very significantly substantiating our viewpoint in this

discussion. The dissent was by Chief Justice Warren, Justice Black, Justice Douglas, and Justice Brennan.

The nature of the case is not important here except that the Court was passing on a statute which was enacted in 1893 conferring immunity upon citizens testifying in a grand jury investigation. The petitioner had been adjudged guilty of contempt for failure to testify and the case was presented to the Supreme Court to review the validity of the procedure resulting in the contempt adjudication.

Notice that this statute was enacted in 1893 and the Supreme Court in the case of *Brown* v. *Walker*, 161 U.S. 591, in 1896 held that this statute confers immunity from prosecution coextensive with the constitutional privilege against self-incrimination, and that, therefore, the witness may not lawfully refuse to testify.

Mr. Justice Stewart, for the majority of the Court, after citing the *Brown* v. *Walker* case and stating that for more than half a century it had been settled law, says this:

"The context in which the doctrine originated and the history of its reaffirmance through the years have been so recently reexamined by this Court in *Ullman* v. *United States*, 350 U.S. 422, as to make it a needless exercise to retrace that ground here. Suffice it to repeat that, *Brown* v. *Walker* has become part of our constitutional fabric; 350 U.S. at 438. It is thus clearly too late in the day to question the constitutional sufficiency of the immunity provided under part I of the act."

It is heartening, at least to those of us who believe in the position that I take here, that the majority of the Supreme Court has recognized in this very recent decision that a statute passed in 1893 and interpreted in 1896, and the interpretation reaffirmed through the years is still the law and has become a part of our constitutional fabric.

This is a good example of the stare decisis, of the reliance upon precedent, and of judicial restraint which we so earnestly insist should be adhered to.

I again express my appreciation for having the opportunity to present my viewpoint before you distinguished gentlemen. I realize the importance of the obligation which you have and I hope that you may give to Congress the right to offer to the people of the United States the opportunity to express their desire on this very important matter.

Mr. KEFAUVER. Senator Long, we are glad to have you with us here.

Senator LONG. Mr. Chairman, I am awfully pressed and I would appreciate it if I could be heard as soon as possible. I just have a brief statement consistent with what Mr. Morrow has to say.

Senator KEFAUVER. Senator Long, your statement may be given now and the committee is glad to have the Senator from Louisiana, Senator Russell Long, with us. He is a cosponsor of this resolution and he will testify at this time.

STATEMENT OF HON. RUSSELL B. LONG, U.S. SENATOR FROM THE STATE OF LOUISIANA

Senator LONG. Mr. Chairman, thank you so much. I will make my statement very brief and attempt merely to add to that which has already been said.

Yesterday, His Majesty, the King of the Belgians, made a speech before the Congress in which he endeared himself to the people of America.

During this talk he said:

America has been called a melting pot, but it seems better to call it a mosaic, for in it each nation, people, and race which has come to its shores has been privileged to keep its individuality, contributing, at the same time, its share of the unified pattern of a new nation.

The King of the Belgians received a generous round of applause for this statement in the House of Representatives and from every American who took these words to heart. I have joined with my colleague, Senator Talmadge, and several other Senators in cosponsoring the joint resolution that is being considered today, the resolution that proposes an amendment to the Constitution of the United States reserving to the States exclusive control over public schools.

This resolution will help to attain that individuality to which His Majesty referred and which is so dear to the hearts of the vast majority of our people.

This resolution would permit the States to protect the customs and traditions of their people, those customs and traditions that have done so much to mold the unified pattern of our new Nation which has assumed such an important position in the free world.

This resolution would permit our States in turn to pass along to their subdivisions similar powers that are accorded to them.

It is true that this resolution stands in the way of forcible integration and amalgamation of the many fine races, creeds, and colors. Our experience in Louisiana has been that the forcible integration decision of the U.S. Supreme Court will not and cannot succeed in the forcible mongrelization of humanity which those decisions seek to achieve.

Further attempts to enforce such decisions will only lead to a dissolution of the public school systems that have done so much to raise our standard of education in this country to the preeminent position it now occupies.

In the interest of preserving our American way of life and strengthening it at a time when all humanity is threatened by growing Communistic influences, I urge the adoption of this resolution and the amendment of our Constitution to spell out in unmistakable language the real intent of our Founding Fathers with respect to this vital element of American life and liberty.

I thank you very much, Senator.

Senator KEFAUVER. Thank you, Senator Long.

Any questions of Senator Long?

All right, thank you very much.

Mr. FENSTERWALD. Mr. Chairman, before our next witness appears, could I put in the record a statement from Mr. Harold L. Putnam, executive secretary, National Society of the Sons of the American Revolution, in support of this amendment?

As I announced this morning, Mr. Putnam is ill and will not be able to attend the hearings, but he has sent this statement for inclusion in the record.

Senator KEFAUVER. I will direct that Mr. Putnam's statement be made a part of the record at this place.

(The statement referred to of Mr. Harold L. Putnam follows:)

STATEMENT BY HAROLD L. PUTNAM, EXECUTIVE SECRETARY, NATIONAL SOCIETY OF THE SONS OF THE AMERICAN REVOLUTION

Mr. Chairman, and members of the Subcommittee on Constitutional Amendments, permit me to express my appreciation of the opportunity which has been given me to present the views of the National Society of the Sons of the American Revolution on the proposed amendment to the Constitution of the United States of America as set forth in S.J. Res. 32.

Our interest in this proposed amendment is based on our opposition to Federal aid to education, and it appears that this legislation, if adopted, will reverse the trend toward greater and greater control of our public school system by the Federal Government.

The view of our society on the question of Federal aid to education is set forth in a resolution adopted by the delegates to the annual meeting (designated in our organization as an Annual Congress) held in San Francisco, Calif., in July 1951. The text of that resolution follows:

"*Resolved*, That we do hereby redeclare our opposition to Federal aid to education as a means of remedying the financial difficulties of the schools in the several States. This device, if established, will and inevitably must subject all of our schools to the domination and political control of the Federal Government. Congress has no power to pass laws governing the schools. It does have absolute authority to control the expenditure of Federal money. Federal control must go and it will always go to every place where that money is spent. This control will be fastened upon us, by the power to withhold future appropriations, by first making the schools financially dependent on the Government at Washington, and by then exercising the absolute power to supervise the curriculum, and to direct and control all of their usual activities. We believe some eachers do not understand the fraud which is being perpetrated on them in the name of Federal aid. In particular we challenge the good faith of those who assert that it is legally possible to write clauses into any Federal aid statute that would limit the power of a future Congress to use school appropriation laws to dominate and control the entire public school system. We state here and now, that to be safe, the financing of our schools must always be local in character and under the immediate direction of school boards elected by the people, and solely responsible to them. We further state that the elimination of the waste and extravagance of the so-called progressive system of education would release substantial amounts of money for the payment of increased salaries; and that much greater public support for the financial problems of the schools will be found when the subversive teaching problem has been solved, and these practices eliminated."

Our opposition to Federal control of our educational system has been reaffirmed at subsequent annual congresses, namely, Williamsburg, Va., 1954; Salt Lake City, Utah, 1957; and Biloxi, Miss., 1958. No doubt another resolution on this same subject will be adopted at the forthcoming congress to be held in Pittsburgh, Pa., May 17 to 20.

The members of our society are convinced that public education is the responsibility of the State and local government and that the history of our country demonstrates the validity of this opinion.

The continued encroachment by the Federal Government on the rights and responsibilities of the sovereign States constitutes a threat to the Republican form of government which is guaranteed under the Constitution.

Therefore, this amendment, Senate Joint Resolution 32, which is designed to curb further encroachment, is in conformity with the policy of our society and is deserving of our support, and my appearance here today is to give expression to our endorsement of this proposed legislation.

Mr. FENSTERWALD. I would also like to read into the record a telegram which is addressed to you, Mr. Chairman, and which is signed John Patterson, Governor of Alabama. The telegram is as follows:

I regret to advise you that I must cancel my appearance before your subcommittee in support of Senator Talmadge's proposed constitutional amendment. Our State legislature is in session and it is imperative that I remain in Montgomery the remainder of the week. As you know, I was scheduled to appear before the subcommittee at 10 a.m., Friday, May 15. If possible, I would like to submit a statement to the subcommittee at a later date for inclusion in the printed record. With best regards, John Patterson.

(The statement referred to above was not received by the subcommittee).

Senator KEFAUVER. We will advise Governor Patterson that we are sorry that he cannot testify in person, but that we will be glad to make his statement a part of the record.

Mr. FENSTERWALD. Now, the last witness for this afternoon, Mr. Chairman, is Mr. Clarence Mitchell, who is representing the NAACP.

Senator KEFAUVER. We are glad to have you with us, Mr. Mitchell.

Mr. MITCHELL. Thank you, Senator.

Mr. Chairman, I would appreciate it if the record would show that I am accompanied by Mr. J. Francis Pohlhaus, who is counsel for the Washington Bureau of the NAACP.

Senator KEFAUVER. We are glad to have you he[illegible], Mr. Pohlhaus.

Mr. Mitchell, you are the director of the Washington Bureau of the National Association for the Advancement of Colored People?

Mr. MITCHELL. That is correct, Mr. Chairman.

Mr. KEFAUVER. We have your statment, and so you may proceed.

Mr. MITCHELL. Thank you.

STATEMENT OF CLARENCE MITCHELL, DIRECTOR OF THE WASHINGTON BUREAU OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ACCOMPANIED BY J. FRANCIS POHLHAUS, COUNSEL

Mr. MITCHELL. I would just like to say, before presenting my statement, Mr. Chairman, that it is very interesting to see how the opponents of the U.S. Supreme Court try to use various European individuals in their arguments.

For example, earlier today we heard Mr. Morrow testifying about the Swedish sociologist, Gunnar Myrdal, as if Mr. Myrdal were some dreadful ogre. I got the impression that he felt Mr. Myrdal ought to just stay right at home and not give us any advice over here.

A little while later, the distinguished Senator from Louisiana, Mr. Long, came in and presented some advice from the King of the Belgians to the effect that America was a mosaic rather than a melting pot.

I think, since this is a kind of a family argument about the U.S. Supreme Court, it might be just as well that the Court's opponents refrain from citing various authorities, because apparently they take only those which seem to suit a particular purpose.

And I must say, in any event, we who have been nutured on the concepts of democracy would not take any direction from a king of any country on how we ought to treat members of the human race.

Senator KEFAUVER. I think it is best to make our own decisions, and we do not have to rely upon advice from anybody abroad but we always respect their opinions.

Mr. MITCHELL. I agree with you.

Mr. Chairman, and members of the subcommittee, I thank you for this opportunity to testify against Senate Joint Resolution 32. To paraphrase the language of the U.S. Supreme Court, the sponsors of this proposal are trying to turn the clock back, but not just to 1868, when the 14th amendment was adopted. They would not stop at the *Plessy* v. *Ferguson* decision in 1896. They would go back to the Dred Scott decision and to 1619.

The clear objective is to——

Senator KEFAUVER. Now, what is this date, 1619?

Mr. MITCHELL. That is the date when the slaves were brought to the American Continent.

Senator KEFAUVER. Oh, yes.

Mr. MITCHELL. The clear objective is to strip from all colored children, from the time they are ready for the kindergarten to their graduation as men and women from professional schools, all legal and constitutional protections won in the course of the history of this Nation.

If the intentions of the sponsors could be carried out, the States could not only revert to the so-called separate but equal practice, but they could also set up a system of public schools for white only, or for a selected group of whites only, or for any other group or class, or there could be a law to exclude colored citizens or other minority groups from any education.

Although the purpose of the proposed amendment is clear, the language is designed to create legal confusion that would cause additional delay in the areas of massive resistance. Even now, with the Governors of Alabama and Georgia testifying in support of this resolution, there will be many foolish people who will be misled into believing that this is a new chance to hold the segregation line.

I think, Mr. Chairman, as a matter of simple arithmetic, we know that since it takes two-thirds of the Congress to pass a constitutional amendment that this amendment has no more chance than a snowball in a tropical climate. But of course there will be a number of people who will not understand that.

They will think that if the Governors can make enough noise up here, while they are lynching and dynamiting back home——

Senator KEFAUVER. Now, Mr. Mitchell, I said when this hearing started, that we were going to run this without vilification and without stirring up any more animosity than there already is, and I am sure you do not mean to say that the Governors are lynching and dynamiting.

Mr. MITCHELL. No, no. I say that the Governors are doing the testifying, but the irresponsible people are doing the lynching and the dynamiting.

Senator KEFAUVER. Well, I thought that is what you meant.

Mr. MITCHELL. I really appreciate the opportunity to clarify that, because I would not want——

Senator KEFAUVER. Do you want to clarify it, "while some irresponsible"——

Mr. MITCHELL. The lawless elements.

Senator KEFAUVER. "Lawless elements are lynching and dynamiting back home."

Mr. MITCHELL. Yes, sir.

Senator KEFAUVER. All right, we will make that change.

Mr. MITCHELL. I think this is clear, Mr. Chairman, that of course the Governors and the Senators and all the others who are proponents of segregation put their statements in the finest of legal phraseology and they are all fine, mannerly people. But of course in every community there are elements who do not put on tuxedos and morning coats when they go in to present their cases. Instead, they resort to rock throwing, lynching, dynamiting, and things of that sort. These are the people who are given a new shot in the arm, so to speak, when it appears that there is some legal way in which the Supreme Court decision can be circumvented.

I think it is very cruel and very unfair to mislead people like that. The sponsors——

Senator KEFAUVER. Well, anyway, your statement is, to carry out your intention of what you want to say, "while unthoughtful and lawless people are lynching back home"?

Mr. MITCHELL. That is correct.

Senator KEFAUVER. And I want to say I think you will agree that that is a mighty, mighty small minority, because I do not know any thoughtful person who approves of any dynamiting and lynching.

Mr. MITCHELL. I wish I could say that I share that view fully. The reason I say that is this. In Mississippi, after the lynching, the most recent lynching, the Governor expressed great shock. A number of other outstanding citizens did also. But the Jackson Daily News, which is one of the leading newspapers in Mississippi, came out with an editorial which could be read only as a kind of effort to excuse the conduct of those who had participated in the lynching.

The editorial went on to try to blame the U.S. Supreme Court, because it said that the Court had been slow in enforcing certain Mississippi decisions and they had done certain things which gave the people the impression that they had to take the law into their own hands.

I certainly do not worry about the lawless elements who put hoods over their faces and come in with cotton gloves to perpetrate a lynching, because we know, as you have indicated, that they are in the minority. But I do worry about important organs of public opinion and important citizens such as Mr. Leander Perez of Louisiana who came up and said essentially the same thing.

Senator KEFAUVER. Well, Mr. Mitchell, I have tried and I want very much to keep this hearing out of personalities; and to keep it away from raising other emotions and stress; and to keep on the merits or demerits of the proposal before us. So I think we would all do better if we would just try to keep to the main point of the resolution.

Mr. MITCHELL. I am just trying to make the record clear, Senator.

Senator KEFAUVER. Without getting on to personalities.

Mr. MITCHELL. I might say I have not said anything that cannot be supported by the record.

Senator KEFAUVER. All right.

Mr. MITCHELL. The sponsors of Senate Joint Resolution 32——

I might add, Mr. Chairman, that one way of avoiding any ill feeling about this would be not to have had a hearing.

The sponsors of Senate Joint——

Senator KEFAUVER. Well, in that connection, when any Senator files a resolution and asks for a hearing on it by any committee of which I am the chairman, I am going to try to grant him a hearing.

Mr. MITCHELL. I can only say I wish you were chairman of some other committees where we have other legislation that has been languishing without any consideration.

The sponsors of Senate Joint Resolution 32 seek to repeal the 14th amendment to the U.S. Constitution insofar as it protects the rights of schoolchildren.

Like many other proposals now before Congress and certain State legislatures, this is another attempt to use vague or vicious language

to undermine decisions of the U.S. Supreme Court in the filed of civil rights.

We would direct the attention of the subcommittee to the probability that if this amendment were interpreted to nullify *Brown* v. *Board of Education*, it would also nullify other Supreme Court decisions affecting education, such as *Pierce* v. *Society of Sisters* and the McCollum case. These were referred to by Senator Dodd earlier. I have a word on them.

Senator KEFAUVER. I know the McCollum case, but what is the Pierce case?

Mr. MITCHELL. I would like to read, if I may, in the interest of time:

Picroe v. *Society of Sisters*, 268 U.S. 510. The State of Oregon, by initiative, adopted a compulsory education act requiring all children between the ages of 8 and 16 to attend public school. The plaintiff, a religious order conducting schools in Oregon, sought an injunction against the enforcement of this law. The injunction was granted by the Federal district court and the district court's decision was affirmed by the Supreme Court. The Supreme Court held that the law interfered with the liberty of parents to direct the upbringing of their children and violated the 14th amendment. It further held that the plaintiff had a right to challenge the law because of the property interest it held in the schools which it would be forced to close.

It, in some ways, is the opposite of the *McCollum* case, but it is our opinion that these cases or these decisions would be affected by this amendment if it were the law.

Senator KEFAUVER. Well, give a little summary of the *McCollum* case at this point.

Mr. MITCHELL. The *McCollum* case, the board of education of Champaign, Ill.—by the way, the citation on that is *McCollum* v. *Board of Education*, 333 U.S. 203.

The Board of Education of Champaign, Ill., had established a program under which clergymen of different faiths would teach religion weekly in the public schools to children whose parents consented. The plaintiff instituted a taxpayer's suit to prohibit this practice. Her son was a student in the school system. The Supreme Court held that this practice violated the principle of separation of church and state required by the 1st and 14th amendments, and ordered the program terminated. It held that the state can neither aid one religion or all religions.

That is the paragraph summary that we have on it, Mr. Chairman.

Senator KEFAUVER. Is it your opinion, and is it the opinion of Mr. Pohlhaus that, if this amendment were adopted and ratified by the States, the States could have a right to set up any religious test they wanted to for admission to schools?

Mr. MITCHELL. I have talked——

Senator KEFAUVER. As well as tests of race?

Mr. MITCHELL. I certainly believe that is the sense of the conversations we had at the time we were preparing this testimony. And if you have no objection, I would like Mr. Pohlhaus to make his own comment.

Senator KEFAUVER. Well, we can wait; why do you not finish your statement?

Mr. MITCHELL. All right. Well, the answer to that question is, "Yes."

Senator KEFAUVER. Well, do you want to amplify on that, Mr. Pohlhaus, at this point?

Mr. POHLHAUS. I will say this. I think that is the intention of the sponsors of the resolution, that it would give exclusive control and that if this intention is carried out in the realm of public education they could set up any test at all or exclude anyone or admit anyone without any restraint.

Senator KEFAUVER. Do you think of any area where the Negro voters were predominant that it would be enabled to have in a school district Negro schools to the exclusion of white schools?

Mr. POHLHAUS. I do not know of any district, frankly, where Negro voters are predominant, Senator. I know of districts where the Negro population is predominant. But in those districts they generally are not allowed to vote.

Mr. MITCHELL. I may say, in fairness to Mr. Pohlhaus, that I cannot imagine any Negro dumb enough to do that. But I would think that if there were people of that low intelligence level they would be free to do it under this proposal.

Thus, the rights not only of colored children, but of millions of other students could be affected by this amendment.

We believe that the reason the proponents of this legislation did not specifically spell out a partial or total repeal of the 14th amendment is because such a proposition would have been so shocking to the conscience of the Nation that it would have been summarily rejected. Instead, they seek to accomplish their objective by innocuous sounding phraseology.

We oppose this legislation for yet another reason. Ever since the Supreme Court's decision in the *Brown* case, in some quarters the decision has been evaded and defied and the Court abused and vilified. This present proposal is the culmination of that evasion, defiance, abuse and vilification. It seeks to legitimize all the attacks that have been directed against the Court and its decisions.

At this point, I would like to remind this subcommittee that the Florida Legislature is considering a bill to jail parents who send their children to integrated schools. I also urge——

Senator KEFAUVER. Well, that was turned down, was it not?

Mr. MITCHELL. I do not know what the status of it is at this point. The last report I had was that it was before the legislature for consideration.

But I am certain that there is a law now in the State of Georgia which empowers the State authorities to go into any city for the purpose of arresting any official who undertakes desegregation of the public schools. This has been inserted in the Congressional Record by Senator Douglas, and it is, as I said, a part of the Georgia law.

There are other statutes like that. I would be glad to make them available for the record, if you would care to have them.

I also urge that the Governors and other witnesses coming before this subcommittee be asked to state how much money they are spending to promote hate campaigns through the mails. The country reeks with libelous and disgusting appeals to racial and religious prejudice. There is a well-organized program, apparently supported by public

funds in some States, to send Nazi-type propaganda into Northern States. A few days ago, I received a piece of this literature that had been sent up to Oregon and distributed on a mass basis. It is my opinion that the witnesses who will appear before this subcommittee in support of Senate Joint Resolution 32 can furnish a gold mine of information on who is putting up the money for the scurrilous printed attacks that are being made on President Eisenhower, the U.S. Supreme Court, the church, and just about everyone who is identified with decency and fairplay.

Those who refuse to abide by the Supreme Court's decision on school segregation have passed resolutions of nullification and interposition. They have passed literally hundreds of laws to evade and delay the effect of the Court's decision. They have incited mob violence by their political demagogy and then stood idly by while the mobs supplanted constituted law and order. They have subjected those who support the Constitution to economic pressures, threats, and physical violence. They have squandered tax moneys on programs of propaganda designed to export their type of racial hatred to other areas of the country and to sow the seeds of racial discord. They have damaged the international reputation of the United States at a time when the President and the Secretary of State should be able to speak without embarrassment at a summit or foreign ministers meeting. Now they ask the Congress of the United States to join their antidemocratic program of repeal of constitutional rights of schoolchildren.

We respectfully urge this subcommittee to reject this resolution.

Senator KEFAUVER. Do you want to add anything to this, Mr. Pohlhaus?

Mr. POHLHAUS. The only thing I would like to add is that with the previous witnesses the question has come up as to the conflict of this amendment and the 14th amendment or any other provision of the Constitution. It seems to me that is disposed of in the language of the resolution itself, stating that: The powers shall be vested exclusively in the State and subdivision and nothing contained in this Constitution shall be construed to deny the residents thereof the right to determine for themselves the manner in which such schools shall be conducted.

It would seem to me that the clear language of the resolution contemplates that no other provision of the Constitution shall be taken into effect in a question involving the conduct of the public school system.

Senator KEFAUVER. In other words, you think that this is a complete exception from the 14th amendment insofar as schools are concerned?

Mr. POHLHAUS. Public schools. I think that is the way it is intended; yes, sir.

Senator KEFAUVER. What is your opinion about religious tests?

Mr. POHLHAUS. I think that would apply as far as religious tests or any other rule of exclusion.

Senator KEFAUVER. What effect do you think this would have, if any, on the 10th amendment?

Mr. POHLHAUS. I cannot see how it would have any direct effect. You mean in the sense that it might weaken the 10th amendment?

Senator KEFAUVER. That has been argued.

Mr. POHLHAUS. My offhand opinion is that I do not see where it would have any effect in that area.

Senator KEFAUVER. Mr. Fensterwald, do you have any questions?

Mr. FENSTERWALD. I would like to ask either Mr. Mitchell, Mr. Pohlhaus, or both if they would comment on the fact that section 5 of the 14th amendment reads: "The Congress shall have the power to enforce by appropriate legislation the provision of this article."

To the best of my knowledge, from its adoption in 1868 until the *Brown* case in 1954, no such legislation has ever been enacted.

Do you have any comment on the fact that no legislation had been enacted in almost a hundred years?

Mr. MITCHELL. I think that it was quite obvious that so far as the school desegregation question was concerned it was not necessary to have any legislation. I think that the Supreme Court by its decision has certainly vindicated that conclusion.

I would say this, however, that I think we need only to look at the composition of a Congress and to know something about the political realities to understand why civil rights legislation of any kind has an extremely difficult path to follow when it is proposed.

So I would say that, first, I do not think that it was necessary for Congress to pass any additional legislation on this point.

Second, I would say that, with reference to the general subject of such legislation, it obviously is squelched by an overwhelming combination of people who, for widely different reasons, want to maintain a system of second-class citizenship in this country based on race.

Mr. FENSTERWALD. Well, that may be your opinion of the complexion of Congress today, but this goes all the way back to the year 1868, and certainly it would be hard to maintain that that was the complexion of Congress as of that date.

And it has been argued that section 5 was put in because it was intended to have the amendment implemented by legislation. This particular aspects of the 14th amendment has not been implemented, and that has been one argument made against the validity of the *Brown* decision. I just wanted your comments.

Mr. MITCHELL. I do not think it necessary to make any after the Supreme Court reached a decision. It covered that question, and I think that the members of the Court are better lawyers than the people who would be advancing that particular point of view.

Mr. POHLHAUS. I would like to make this comment, too, on the *Brown* decision. It is the law of the land, and I think too many witnesses who come here try to reargue the *Brown* decision. I frankly do not want to get in any reargument of that case because I accept it.

Mr. FENSTERWALD. I do not mean to be argumentative.

Mr. POHLHAUS. No, I realize that.

Mr. FENSTERWALD. I just meant to comment on this point.

Senator KEFAUVER. Of course some witnesses say they do not think it is the law of the land but think it is the law of that case.

Mr. POHLHAUS. I assume you could say that about any case.

Mr. MITCHELL. I think, too, that most of those witnesses were not speaking as lawyers, they were speaking as dissenters on a decision with which they did not agree. If the Supreme Court had decided their way, I think they would be most loud in their support of it. They

are certainly very vigorous in the support of the *Plessy* case, which was not even a school case. I think it is pretty clear that this is a case of people who lost their argument in a regular court and are now seeking a forum in which they cannot reach a reversal of the decision but in which they can stir up a lot of controversy which will accomplish no good result.

Senator KEFAUVER. Is there anything else?

Mr. FENSTERWALD. No, sir.

Does Mr. Chumbris have any questions?

Senator KEFAUVER. Mr. Chumbris?

Mr. CHUMBRIS. I have no questions, Mr. Chairman.

Mr. FENSTERWALD. Mr. Chairman, that is the last witness. We will meet at 10 a.m. tomorrow, if it is agreeable to you, in room 2228, which is the Judiciary hearing room in the New Senate Office Building.

Senator KEFAUVER. We stand in recess until 10 o'clock tomorrow morning.

(Whereupon, at 4 p.m., the subcommittee recessed, to reconvene at 10 a.m., Thursday, May 14, 1959.)

CONSTITUTIONAL AMENDMENT RESERVING STATE CONTROL OVER PUBLIC SCHOOLS

THURSDAY, MAY 14, 1959

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:05 a.m., in room 2228, New Senate Office Building, Hon. Estes Kefauver (chairman of the subcommittee) presiding.

Present: Senator Kefauver.

Also present: Bernard Fensterwald, counsel; Miss Kathryn Coulter, clerk, and Peter N. Chumbris, representing Senator Langer.

Senator KEFAUVER. The committee will come to order.

The committee is honored to have the distinguished Senator from Virginia, Senator Willis Robertson, with us today. Senator Robertson is one of the sponsors of Senate Joint Resolution 32 and is an able and distinguished Senator, and we are always pleased to have his views.

STATEMENT OF HON. A. WILLIS ROBERTSON, U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator ROBERTSON. Mr. Chairman, I very much appreciate your kind and generous comment, and I always appreciate the privilege of appearing before this great committee, because it deals with some of the problems that go to the very essence of our Republic.

I have frequently in recent years stated that we have a unique form of government, different from that of any other nation; and, incidentally, it has lasted longer than the present government of any other nation.

One of the unique phases of our Government is that it is a Federal Union. And the dictionary defines "Federal Union" as meaning a union of sovereign States.

I have felt that the inherent strength of our form of government, our best bulwark from the type of emotionalism which has carried some nations to dictatorship, or some nations down the road, first to socialism and then to communism, is the fact that, under our Constitution, the powers that were not delegated specifically or by necessary implication to the Federal Union, which we call the Federal Government or the Central Government, were reserved to the States of the Union. And if the time ever comes when we wipe out those rights, I frankly feel that the perpetuity of what we call American constitutional liberty would be in serious jeopardy.

The more I study the Constitution of the United States, Mr. Chairman, the more ready I am to accept the estimate of the British statesman Gladstone who characterized it as "the most wonderful work ever struck off at a given time by the brain and purpose of man."

Feeling as I do about the quality and the importance of our Constitution I am generally opposed to the idea of amending it because I feel that what we do is more likely to detract than to add to the work of those who framed it. I agreed to become a cosponsor of Senate Joint Resolution 32 not because I have any feeling that there is a real need to amend the Constitution but simply because it appears that the Constitution has been so radically misinterpreted that it is necessary for us to give the people of the Nation a chance to positively reaffirm what, in my opinion, the Constitution already states by clear implication concerning jurisdiction over public schools.

At the Constitutional Convention which met in 1787 the question of public schools or public education was not even raised but an attempt was made to include in the Constitution a provision authorizing the Federal Government to establish a national university and that proposal was rejected even though it was favored by James Madison and George Washington. There was lengthy debate, however, both during and after the Convention on the question of the division of powers between the Federal Government and the States, and, after the Convention had finished its work, advocates of the new Constitution were able to obtain ratification only by promising that certain amendments would be promptly adopted. Those amendments approved by the first Congress included, as I need hardly remind you, the ninth which said:

> The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people—

and the 10th which said:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

My own State of Virginia, incidentally, had not been satisfied even by the assurance that these amendments would be adopted. The State ratifying convention named a committee, headed by Governor Edmond Randolph and including James Madison and John Marshall, to draft a form of ratification that would include certain reservations as to States rights.

The resolution reported by that committee and adopted by the convention said:

> the powers granted under the Constitution, being derived from the people of the United States, be resumed by them whensoever the same shall be perverted to their injury or oppression, and at their will: that, therefore, no right of any denomination, can be canceled, abridged, restrained, or modified by the Congress, by the Senate or House of Representatives, acting in any capacity, by the President, or any department or office of the United States, except in those instances in which power is given by the Constitution for those purposes: and that, among other essential rights, the liberty of conscience and of the press cannot be canceled, abridged, restrained, or modified, by any authority of the United States.

Believers in the Federalist interpretation of the Constitution will seek in vain, even in the 14th amendment, for any authorization for the Federal Government to control or interfere in the field of public

education and it was only by a twisting of that amendment that the Supreme Court in its 1954 decision held that because of an alleged denial of equal protection of the laws to certain persons, the Federal Government could intervene and tell States and localities who should attend or who should not attend certain schools. It should be noted that this decision did stop with the cases which were actually decided but that it has been used as an instrument through which Federal courts at various levels have since undertaken to assume supervision over local school affairs and issue orders as to how those schools should be run and the schedule on which changes should be made, regardless of local considerations and problems.

The situation in which some of the Original Thirteen States find themselves, as a result of these decisions, is indeed ironic when it is compared with recent actions of the Congress in granting statehood to Alaska and to Hawaii. The laws providing for admission of these two new States contained a specific provisions which said that schools and other educational institutions supported in whole or in part by trust funds provided for those States through grants of Federal property shall remain forever under the exclusive control of the States.

What we are trying to do in effect by Senate Joint Resolution 32 is merely to guarantee to all States of the Union the right which has been assured to Hawaii and Alaska for the citizens of the States to have administrative control of public education and educational institutions without Federal interference.

It is not my intention, Mr. Chairman, to argue the merits of the resolution today, but I have made this brief comment only by way of introduction of a distinguished Virginian who will present to you the viewpoint of my State on the issues which are involved in the pending resolution.

This gentleman who has accepted the invitation to testify before this committee is a native of the city of Richmond and he received his law training, as I did mine, at the University of Richmond. He is a member of one of Richmond's leading law firms and his professional career has included service as president of the Richmond Bar Association and chairmanship of a committee of the Richmond bar that organized the courts of the city in a way which won an award of merit from the American Bar Association.

At the present time he is president of the Virginia State Bar Association and also serves as chairman of the Commission on Constitutional Government for Virginia. Aside from his activities strictly within the field of his profession, this witness has achieved distinction as a writer. His publications include a college textbook on business law and, more importantly, he is the author of a two-volume biography of Edmund Pendleton, the first chief justice of the Supreme Court of Appeals of Virginia. This work won the Pulitzer Award for Biography in 1954.

Mr. Chairman, I am indeed pleased to have this opportunity to present to you and the members of this distinguished committee Hon. David J. Mays, my constituent and my highly esteemed friend.

Senator KEFAUVER. Thank you very much, Senator Robertson.

Mr. Mays, you have been well introduced, and we are glad to have Senator Robertson here to introduce you.

Mr. MAYS. Thank you very much, Senator. You can see when my friend Senator Robertson does so well by plain constituents, why we love him and intend to keep him forever.

Senator KEFAUVER. Mr. Mays, I have a copy of your prepared statement. I notice it has a number of footnotes and citations, and it will be printed in full as prepared here; therefore, it will not be necessary for you to read all the footnotes.

Mr. FENSTERWALD. Mr. Chairman, I suggested earlier that, if the witness preferred, he could place his prepared statement in the record, and that we would print it in whole; and that he might wish to summarize it, add to it, and make certain interpolations as he goes along, rather than read the document.

Senator KEFAUVER. Just as he wishes.

Mr. MAYS. Mr. Chairman, I had no intention of reading the document.

Senator KEFAUVER. Then it will be printed in the record in full at this place.

STATEMENT OF DAVID J. MAYS, CHAIRMAN, VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, RICHMOND, VA.

(The prepared statement of Mr. Mays is as follows:)

Mr. Chairman and members of the committee, I am David J. Mays of Richmond, Va., and appear in my capacity as chairman of the Virginia Commission on Constitutional Government, whose purpose is to bring to the attention of our people basic concepts relating to the Constitution of the United States.

I am grateful for the opportunity of appearing before you in connection with the Senate Joint Resolution 32.

Since many arguments have been and will be made concerning this resolution, I believe that I can be of most use to you in confining myself to the historical background of the 14th amendment, and more particularly to the interpretations placed thereon by the Congress and by the States at the time of its ratification. The source of this information is the legal brief prepared by my law office and the counsel with whom we were associated in the school cases decided by the Supreme Court of the United States in 1954. This résumé clearly demonstrates that the Court did not follow the interpretations placed upon the 14th amendment by the Congress and the States at the time of its adopion, and that action is needed to restore the meaning of the amendment as it was understood for nearly a century.

THE EFFECT OF THE 14TH AMENDMENT UPON RACIAL SEGREGATION IN THE PUBLIC SCHOOLS, AS INTERPRETED BY THE CONGRESS

The starting point in any such discussion is the Civil Rights Act of 1866 since it was designed to cover the same field as the amendment. The bill provided:

"That there shall be no discrimination in the civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color * * * shall have the same rights to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none others, any law, statutes, ordinance, regulation, or custom to the contrary notwithstanding." [1]

When the bill came before the Senate, there was some concern on the part of Senator Cowan, Pennsylvania Republican, that it would end segregation in the schools; [2] but he was assured by Senator Trumbull, of Illinois, the bill's patron,

[1] Congressional Globe, 39th Cong., 1st sess. (1866) 211.
[2] Ibid., p. 500.

that it affected only civil rights.[3] When the bill reached the House, the floor leader, Mr. Wilson of Iowa, chairman of the Judiciary Committee to which the bill had been committed, stated in opening the debate:

"What do these terms mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed. * * * Nor do they mean that * * * their children shall attend the same schools. These are no civil rights or immunities."[4]

And he repeated the assurance later in the course of debate.[5]

The Civil Rights Act is important in this discussion since it referred to the "full and equal benefit of all laws" which could mean nothing less than equal protection.

The resolution proposing the 14th amendment had been introduced before the Civil Rights Act and both were before the Congress at the same time. There is nothing in the proceedings of the House committee that considered it to indicate that school segregation was discussed, and there is nothing to that effect in the majority and minority reports that came from the committee. Mr. Thaddeus Stevens, one of the strongest advocates of the amendment did not indicate that it went beyond the Civil Rights Act. His position was that the amendment was necessary since "the first time the South with their copperhead allies obtained control of Congress the Civil Rights Act would be repealed."[6] He was anxious to put the Civil Rights Act beyond the reach of transient congressional majorities.

In the midst of the debate on the amendment in the House the Senate passed "an act donating certain lots in the city of Washington for schools for colored children in the District of Columbia."[7] And another statute was enacted to provide for equitable apportionment of school funds to Negro schools.[8]

The Congress would hardly have taken such a course in the midst of the debates over the Civil Rights Act and the 14th amendment had it been thought that they barred segregation in the public schools. Moreover, when the Congress codified the laws relating to the District of Columbia in 1874, it specifically preserved the mandatory segregation requirements enacted in 1866.[9] These statutes remained in effect until declared unconstitutional in *Bolling* v. *Sharpe*, 347 U.S. 497.

Alabama rejected the 14th amendment in 1866.[10] After its government was reorganized under Federal military rule, the amendment was ratified without debate (1868).[11] A new constitution was adopted in the same year without reference to segregated schools although there is evidence that it was recognized that segregation would be practiced.[12] The legislature, less than a month after its ratification of the amendment, adopted a general school law requiring segregation.[13] Obviously, the legislature saw no conflict between the amendment and the school statute. The next constitution (1875) made segregation mandatory.[14]

Arkansas at first rejected the amendment.[15] Committee reports in both houses of the assembly stated objections in detail, but there is no indication that the amendment was thought to affect segregation.[16] The same assembly specifically required it.[17] The amendment was ratified in 1868 by a military legislature,[18] which then directed the State board of education to set up segregated schools.

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[3] Ibid., p. 600.
[4] Ibid., p. 1117.
[5] Ibid., p. 1294.
[6] Ibid., p. 2459.
[7] Ibid., p. 2719.
[8] 14 Stat. 216 (1866).
[9] Revised Statutes of the District of Columbia, 18 Stat., pt. 2 (1874).
[10] Alabama Senate J. (1866–67) 155; Alabama House J. (1866–67) 84.
[11] Alabama Senate J. (1868) 10; Alabama House J. (1868) 10.
[12] Bond, "Negro Education in Alabama, a Study in Cotton and Steel" (1939).
[13] Alabama Acts (1868) 148.
[14] Alabama constitution (1875), art. 13, 51.
[15] Arkansas S.J. (1866) 262; Arkansas H.J. (1866–67) 291.
[16] Arkansas S.J. (1866) 268; Arkansas H.J. (1866–67) 288.
[17] Arkansas Stat. (1866–67) 166.
[18] Arkansas Stat. (1868) No. LII, S. 107.

California never ratified the amendment, but its assembly must have concluded that it did not ban segregation in the public schools, since the statutes requiring segregation in 1863 and 1864 were repeated in 1866 and 1870.[19]

Connecticut abolished school segregation in 1868,[20] but there is nothing to indicate that the amendment was in any way related to the statute. Of course, this was not a grave issue in that State since it had only 9,008 Negroes according to the 1870 census.

Delaware did not ratify the 14th amendment until 1901. At that time its constitution, adopted in 1897, required segregation.[21] Certainly, Delaware did not consider the amendment in contravention of its constitution.

Florida ratified the amendment in 1868,[22] and in the same year adopted a new constitution under pressure of the Reconstruction Act.[23] Nothing was said about school segregation, although there was quite a cross section represented in the assembly: 23 Democrats, 13 carpetbaggers, 21 scalawags and 10 Negroes.[24] It is true that Florida prohibited segregation by statute in 1873;[25] but, according to the Florida Attorney General, the statute was not enforced, and in the constitution which became effective in 1887 segregation was required.[26] There is no affirmative evidence that the amendment was considered to have outlawed school segregation.

Georgia ratified the amendment in 1870.[27] The same assembly passed the first statute establishing a public school system and it expressly required segregation.[28] The Governor was a Republican and a majority in both houses were Republicans, but they defeated an amendment to eliminate the segregation provision.[29]

Illinois ratified the amendment in 1867.[30] There is nothing in the official publications or in current newspaper accounts to indicate any intention to affect public schools. The superintendent of public instruction reported (1865–66) that no schools were provided for Negroes since the law did not contemplate their mixing with the whites.[31] In his next report he stated:

"The question of coattendance, or of separate schools, is an entirely separate and distinct one, and may safely be left to be determined by the respective districts and communities, to suit themselves. In many places there will be but one school for all; in many others there will be separate schools. This is a matter of but little importance, and one which need not and cannot be regulated by legislation."[32]

The Illinois Constitution of 1870 required compulsory education but made no reference to segregation.[33] The Governor, in his message to the assembly, urged statutes to implement the constitution, and said:

"The question whether children of different complexions shall be admitted to and instructed in the same school is one of mere local and temporary interest, and may be safely left to those who vote and pay the taxes."[34]

The constituted authorities of Illinois obviously thought that the 14th amendment did not wipe out segregation in the schools. Nor did Illinois bar segregation in the schools until 1874.[35]

Indiana adopted the amendment in 1867.[36] None of those advocating adoption suggested that segregation in the schools would be affected. Under the school law of 1865, there was no provision for Negro pupils.[37] In 1869, however,

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[19] California Stat. (1863), ch. CLIX, S. 68; (1864) ch. CCIX, S. 13; (1866) ch. CCCXLII, Ss. 57–59; (1870) ch. DLVI, Ss. 56–57.
[20] Connecticut Public Acts (1868), ch. CVIII.
[21] Delaware constitution (1897), art. 10, S. 2.
[22] Florida S.J. (1868) 9; Florida H.J. (1868) 9.
[23] Florida Constitution (1868), art. VIII, sec. 1.
[24] Davis, "Civil War and Reconstruction in Florida" (1913), 259.
[25] Florida Laws (1873), ch. 1947.
[26] Art. XII, sec. 12.
[27] George S.J. (1870), vol. I, 74; Georgia H.J. (1870) 74.
[28] Georgia Public Laws (1870) 49.
[29] Georgia H.J. (1870) 449.
[30] Illinois S.J. (1867); Illinois H.J. (1867) 134.
[31] Report of Superintendent of Public Instruction of Illinois (1865–66) 28; Illinois Laws (1865) 105.
[32] Report of Superintendent of Public Instruction of Illinois (1867–68) 21.
[33] Illinois Constitution (1870), art. VIII, sec. 1. A proposal to require segregated schools was defeated, Journal of Constitutional Convention of Illinois (1869) 234, but the majority did not bar segregation.
[34] Message to legislature by Governor of Illinois (1871) 26.
[35] Illinois Rev. Stat. (1874), ch. 122, sec. 100.
[36] Brevier Legislative Reports (1867) 58, 90.
[37] Indiana Laws (1865) 8.

the statute was amended and separate schools were provided for Negroes.[38] The debate was extensive, but there was no suggestion that the 14th amendment was violated.[39] Segregated schools were made permissive by statute in 1877.[40] In 1874, the Supreme Court of Indiana rejected the argument that the 14th amendment was violated by school segregation statutes, citing the action of Congress in maintaining segregation in the schools of the District of Columbia.[41] It did so again in 1926.[42]

Iowa's constitution barred school segregation before the adoption of the amendment, according to its supreme court.[43] After the adoption of the amendment, an effort was made to segregate the schools, but the Iowa Supreme Court held this violative of Iowa statutes. The 14th amendment was not mentioned.[44]

Kansas ratified the amendment in 1867.[45] The same legislature in the same year authorized segregated schools in the cities of the second class;[46] and, in 1868, authorized such schools in cities of the first class.[47] Except for one adverse vote in the house, action on the latter was unanimous.[48] Except for the period 1876–79, segregated schools were maintained until the Brown decision.[49]

Kentucky rejected the amendment in 1867[50] and never again considered it. There is nothing to indicate that the amendment affected that decision. The legislature obviously thought the amendment was not related to school segregation since it established separate schools for Negroes that same year.[51] And the constitution of 1891 required segregated schools.[52]

Louisiana rejected the amendment unanimously in 1867.[53] Reconstruction caused the 1868 legislature to be composed mostly of Negroes who adopted the amendment by a wide margin.[54] That same year a constitution was adopted barring school segregation.[55] Several members gave reasons for their votes, but none mention the 14th amendment.[56] Riots followed, and no effective schools were established[57] while the 1868 constitution was in effect.[58] In 1879 a new constitution was adopted requiring school segregation.[59] There is no affirmative evidence that the people of Louisiana thought that the amendment affected segregated schools.

Maine never had segregation, and its Negro population in 1870 was only 1,606, about one-quarter of 1 percent of its population.

Maryland never ratified the amendment. In his message of submission the Governor did not mention the amendment;[60] nor did the lengthy report of the joint committee on Federal relations to which the amendment was referred.[61] Maryland adopted a new constitution in 1867 and it did not require segregation in the schools. But the debates in convention make it clear that the delegates did not think the subject required discussion, must less prohibition.[62] When a comprehensive school system was set up by statute in 1868, it provided for separate schools for the races.[63] All of this was contemporaneous with the early history of the 14th amendment and clearly shows that Maryland thought it had no application.

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[38] Brevier Legislative Reports (1867) 267–68, 353, 444. Cf. id., pp. 356, 444.
[39] Idem (1869) 34, 341–342, 419–96, 506–12, 533.
[40] Indiana Laws (1877) 124.
[41] *Cory* v. *Carter*, 48 Ind. 327 (1874).
[42] *Greathouse* v. *Board of School Commissioners*, 194 Ind. 95, 151 NE. 411.
[43] *District* v. *City of Dubuque*, 7 Iowa 262 (1858).
[44] *Clark* v. *Board of Directors*, 24 Iowa 266 (1868).
[45] Kansas S.J. (1867) 76, 128; Kansas H.J. (1867) 79.
[46] Kansas Laws (1867), ch. 49, S. 7.
[47] Kansas General Statutes (1868), ch. 18, art. V, S. 75.
[48] Kansas H.J. (1868), 637; Kansas S.J. (1868), 389, 391, 399.
[49] Kansas Laws (1876), ch. 122; Kansas Laws (1879); Kansas General Statutes (1949) secs. 72–1724.
[50] Kentucky S.J. (1867) 64; Kentucky H.J. (1867) 68.
[51] Kentucky Acts (1867) 94.
[52] S. 187.
[53] Louisiana S.J. (1867) 20; Louisiana H.J. (1867) 23.
[54] Louisiana S.J. (1868) 21; Louisiana H.J. (1868) 8.
[55] Louisiana Constitution (1868), art. 135.
[56] Journal of Louisiana Constitutional Convention J. (1868), pp. 200-201.
[57] Annual Report of Louisiana State Superintendent of Public Education (1874), LI LXXVI; idem (1875) 40–73.
[58] Idem (1877) IV.
[59] Art. 224; cf. art. 231.
[60] Message of the Governor of Maryland to the legislature of 1867, p. 22.
[61] Documents of the General Assembly of Maryland, regular session, 1867.
[62] Debates of the Maryland Constitutional Convention of 1867, pp. 199–203, 243–24 251–257.
[63] Maryland Laws (1868), ch. 407; idem, p. 766.

Massachusetts prohibited segregated schools by statute in 1855,[64] and its adoption of the 14th amendment throws no light. The Governor reviewed the amendment in detail but made no reference to its application to schools.[65]

Michigan passed a statute in 1867 providing that "all residents of any district shall have an equal right to attend any school therein."[66] The Supreme Court of Michigan construed this as permitting Negroes to attend white schools. The opinion made no reference to the 14th amendment.[67]

Minnesota abolished segregated schools in 1864,[68] and throws no light on our problem. Minnesota had only 759 Negroes in the 1870 census.

Mississippi at first rejected the amendment out of hand.[69] Reconstruction followed and the provisional Governor, a major general of the U.S. Army, compelled ratification.[70] Segregation was not mentioned in the constitution of 1868,[71] nor in the 1870 statute setting up a school system.[72] However, the Republican Lieutenant Governor recognized that the statute accomplished segregation in effect, since in a speech to the Senate he said: "If the people desire to provide separate schools for white and black, or for good and bad children, or large or small, or male or female children, there is nothing in this law that prohibits it."[73] The schools established under this statute were nearly always segregated,[74] and segregation was expressly required by statute in 1878. The Mississippi Legislature that ratified the 14th amendment, dominated as it was by Republicans and former slaves, did not consider that ratification made school segregation unlawful.

Missouri ratified the amendment in 1867,[75] but no reference to schools is found in the proceedings. It has been consistent in maintaining segregated schools: the constitution of 1865,[76] and statutes enacted in 1865, 1868, 1869 and 1874.[77] Segregation was again required by the constitution of 1875 without debate,[78] and subsequent statutes laid down the same requirement in 1879, 1887, and 1889.[79]

Nebraska was admitted to the Union in 1867 and immediately ratified the amendment.[80] While the first school statute, enacted in 1867, made no reference to segregation,[81] the legislature specifically declared against segregation at the University of Nebraska when it was established 2 years later.[82] There is nothing in the record to indicate that school segregation was thought to be required by the amendment. Nebraska had only 789 Negroes in the 1870 census, and the matter of racial mixing gave no concern.

Nevada ratified the amendment in 1867.[83] The same legislature provided for segregated schools.[84] There was a minority report by the committee that recommended this legislation, but there is nothing to indicate that the division of opinion was caused by the amendment.[85] In 1872 the Nevada Supreme Court held that a particular statute providing separate schools for Negroes was invalid under the Constitution of Nevada though not under the 14th amendment.[86] The dissenting opinion stated:

"The case of relator was sought to be maintained on the ground that the statute was in violation of the 14th amendment to the Constitution of the United States. I fully agree with my associates that proposal of counsel is utterly untenable."

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[64] Massachusetts Acts and Resolves (1855), ch. 256.
[65] Message of the Governor of Massachusetts to the general court, Jan. 4, 1867, pp. 67 et seq.
[66] Michigan Laws (1867) 43.
[67] *People ex rel. Workman* v. *Board of Education of Detroit* (18 Mich. 400 (1869).
[68] Minnesota Laws (1864) 25–26.
[69] Mississippi H.J. (1867) 201–202, App. p. 77; Mississippi S.J. (1867) 195–196.
[70] Mississippi H.J. (1870) 18, 26; Mississippi S.J. (1870) 19.
[71] See art. VIII relating to education.
[72] Mississippi Laws (1870), ch. 1.
[73] Mississippi S.J. (1870) 440.
[74] Message of the Governor of Mississippi (1871) 6; Annual Report of Superintendent of Public Instruction of Mississippi (1871) 66, 124–127, showing only two mixed schools in the entire State.
[75] Missouri S.J. (1867) 30; Missouri H.J. (1867) 50.
[76] Missouri Constitution (1865), art. IX, sec. 2.
[77] Missouri Laws (1865) 177; (1868) 170; (1869) 86; (1874) 163–164.
[78] Missouri Constitution (1875), art. XI, sec. 3.
[79] Missouri Revised Statutes (1879), sec. 7052; Missouri Laws (1887) 264; Missouri Laws (1889) 296.
[80] Nebraska H.J. (1867) 15; Nebraska S.J. (1867) 174.
[81] Nebraska Laws (1867) 101.
[82] Nebraska Laws (1869) 172, 177.
[83] Nevada S.J. (1867) 47; Nevada Assembly J. (1867) 25.
[84] Nevada Statutes (1867) 95.
[85] Nevada Assembly J. (1867) 208, 211.
[86] *State* v. *Duffy*, 7 Nev. 342, 8 Am. Rep. 718 (1872).

So there was unanimity only to the extent of agreeing that the amendment had no application to segregation.

New Jersey ratified the amendment in 1866.[87] Although when the Democrats got control of the assembly in 1868 they rescinded that action over the veto of the Governor, and stated numerous objections to the amendment, none of them related to its effect upon the school system.[88] New Jersey never had mandatory school segregation by law, but in 1868 the State superintendent of schools interpreted the statute to permit segregation,[89] and there was no amendment of the statute until 1881, when segregation in the schools was abolished.[90]

New York ratified in 1867.[91] It had long permitted separate schools for the races. In 1864, as part of the general revision of the school laws, local authorities were empowered to establish separate schools for Negroes,[92] and this act was continued in effect in subsequent codifications.[93] Authorities in some localities took advantage of the act and maintained separate schools.[94] Although the New York Constitutional Convention of 1867 adopted a strong resolution on civil rights, there was nothing said about abolishing school segregation.[95] Efforts were made over a period of more than 30 years to have school segregation statutes declared unconstitutional in the New York courts, but in each case the court refused.[96]

North Carolina ratified in 1868.[97] A new constitution, adopted that same year, did not expressly require segregation, but the convention adopted a resolution asserting that the interest and happiness of the races would best be promoted by separate schools.[98] This convention, it will be observed, was dominated by the radical Republicans who recognized the validity of segregation statutes.[99] Within 2 weeks after ratification of the 14th amendment, the assembly adopted a joint resolution asserting that it was the duty of the assembly to adopt a system of free public schools, but that the races should be separated.[1] Accordingly, legislation was adopted to carry out that purpose,[2] and segregated schools were thereafter maintained under law until North Carolina was recently required to integrate by force of Federal court order.

Ohio ratified in 1867.[3] No mention was made in those proceedings of school segregation. The following year, a resolution was passed by both Houses rescinding its previous action.[4] Again, no mention of school segregation. Ohio had a long record of segregated schools. A statute providing schools for Negroes was enacted as early as 1831.[5] Others were enacted in 1847 and 1848.[6] In 1860 separate schools were required where there were more than 30 children in a school district.[7] In 1874 separate schools were authorized in the discretion of local authorities,[8] and this provision was codified in 1880.[9] Segregation was not barred by statute until 1887.[10]

Oregon ratified in 1866[11] and rescinded in 1868.[12] There is no mention of

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[87] N.J.S.J. (Extra Session, 1866) 14; Minutes of the Assembly (1866) 8, 17.
[88] New Jersey Acts (1868) 1225.
[89] Annual Report of State Superintendent of Schools (1868) 41–42.
[90] New Jersey Laws (1881), ch. CXLIX, p. 186.
[91] New York S.J. (1867) 34; New York H.J. (1867) 77.
[92] New York Laws (1864), ch. 555, title X, § 1.
[93] New York Laws (1894), ch. 556, title XV, art. 11; New York Laws (1909), ch. 21, art. 10.
[94] Report of New York Superintendent of Public Education (1867) 75–76, 206, 208–209; (1868) 19, 219–220, 247–249; (1869) 78–79, 202–203, 227; (1870) 97–98, 230.
[95] New York Constitution (1868), art. IX; Documents of the Convention of the State of New York (1868), No. 15.
[96] *Dallas* v. *Fosdick*, 40 How. Prac. 249 (1869); *People ex rel. Dietz* v. *Easton*, 13 Abb. Prac. (N.S.) 159 (1872); *People ex rel. King* v. *Gallagher*, 93 N.Y. 438 (1883); *People ex rel. Cisco* v. *School Board of Queens*, 161 N.Y. 598, 56 N.E. 81.
[97] North Carolina Laws (1868) 89.
[98] Constitution of the State of North Carolina, Together With Ordinances and Resolutions of the Constitutional Convention Assembled in the City of Raleigh, Jan. 14, 1868 (1868), 122.
[99] Noble, "A History of Public Schools in North Carolina" (1930) 299.
[1] North Carolina H.J. (1868) 54; North Carolina S.J. (1868) 237.
[2] North Carolina Laws (1868–69), ch. 184.
[3] Ohio S.J. (1867) 7; Ohio H.J. (1867) 12; Ohio Laws (1867) 320.
[4] Ohio H.J. (1868) 38; Ohio S.J. (1868) 39; Ohio Laws (1st sess., 1867) 280.
[5] Ohio Laws (1831) 414.
[6] Ohio Laws (1847) 81; (1848) 17.
[7] 2 Ohio Rev. Stat. (1860) 1357.
[8] Ohio Laws (1874) 513.
[9] Ohio Rev. Stat. (1880), § 4008.
[10] Ohio Laws (1887) 84.
[11] Oregon S.J. (1866) 35; Oregon H.J. (1866) 74.
[12] Oregon S.J. (1868) 82, 131; Oregon H.J. (1868) 271.

school segregation in either record. Nor was any segregation statute passed. Oregon had only 346 Negroes in 1870 and there was no problem.

Pennsylvania ratified in 1867.[13] The debates are preserved, and there are some references to segregation, but it is not clear that the legislature believed that school segregation was involved. Subsequently, however, the legislature did make it clear that the 14th amendment did not affect school segregation, since it required separate schools in Pittsburgh in 1869,[14] and did not abolish school segregation until 1881.[15] Meantime, the constitutionality of segregation had been upheld in the courts.[16]

Rhode Island ratified in 1867,[17] but school segregation had been abolished by statute in January 1866.[18] The 14th amendment, therefore, was never involved.

South Carolina in 1866 unanimously rejected the amendment for one vote in the house.[19] Then came Reconstruction, followed by the adoption of a constitution (1868) which abolished segregation in the public schools.[20] Three months after the convention adjourned the 14th amendment was ratified.[21] There is nothing to indicate that the amendment was a factor either in the convention or the legislature. Even though the radical element was then in control in South Carolina and had abolished segregation by law, its Governor, a brigadier general, U.S. Army, advocated that in practice the races be separated in the schools, and that the ultimate solution of the problem be left to time.[22] The legislature followed his advice and never set up the system of schools contemplated by the framers of the constitution, but something very different.[23] In 1870, a Massachusetts Negro was named the first superintendent of public education. He submitted a report to the legislature which contained recommendations from local school authorities, 12 of the 13 reporting advocating segregation.[24] In practice, there was little integration. When the superintendent ordered integration for the School of the Deaf, Dumb, and Blind, it closed down, and remained closed until it was reopened 3 years later on a segregated basis. Efforts to integrate the State university also failed.[25]

Tennessee ratified the amendment in 1866 after some members were put under arrest to make a quorum. Efforts were made by the opponents to except various State rights from its operation, but no one seemed to consider it necessary to make exceptions to cover segregation in the public schools.[26] The same legislature which ratified the amendment amended the school law (March 5, 1867) to require segregated education in Tennessee,[27] a statute which the Republican Governor referred to in his second inaugural address as "wise and desirable." In 1870, school segregation was written into the constitution,[28] and reenacted in a further amendment to the school laws in 1873.[29] They have remained segregated until our day.

Texas at first rejected the amendment.[30] Both house and senate committees on Federal relations filed long reports opposing ratification, pointing out that the amendment might give the Negroes the vote, the right to serve on juries, to bear arms, etc.; but no one seemed to think it necessary to mention segregation in the schools, which was not enumerated among the objections.[31] Then came Reconstruction and ratification of the amendment in 1870.[32] Again, there is not record of any reference to schools. The 1869 constitution required establishlishment of a free school system, but segregation was not mentioned.[33] The same legislature that ratified the amendment enacted a statute which left it to

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[13] Pennsylvania S.J. (1867), No. 125; Pennsylvania H.J. (1867) 278.
[14] Pennsylvania Laws (1869), No. 133, sec. 15.
[15] Act of June 8, 1881, Public Law 76.
[16] *Commonwealth* v. *Williamson*, 30 Legal Int. 406 (1873).
[17] 25 Journal of the Rhode Island Senate (1865–68), Feb. 5, 1867; 41 Journal of the Rhode Island House (1866–69), Feb. 7, 1867.
[18] Rhode Island Acts and Resolves (1866), ch. 609.
[19] Charleston Daily Courier, Dec. 20, 22, 1866.
[20] Art. X, sec. 10.
[21] Charleston Daily Courier, July 8, 9, 1868.
[22] Ibid., July 10, 1868.
[23] *Holler* v. *Rock Hill School District*, 60 S.C. 41, 38 S.E. 220, 221 (1901).
[24] Reports and Resolutions of the South Carolina General Assembly (1870) 408–487.
[25] Simpkins and Woody, "South Carolina Reconstruction" (1932), 439–442.
[26] Tennessee S.J. (called session), (1866) 4, 23, 24, 41; Tennessee H.J. (called session), (1866) 25, 36.
[27] Tennessee Statutes (1866–67), ch. XXVII, sec. 17.
[28] Art. XI, sec. 12.
[29] Tennessee Statutes (1873), ch. XXV, sec. 30.
[30] Texas H.J. (1866) 584; Texas S.J. (1866) 471.
[31] Texas H.J. (1866) 578; Texas S.J. (1866) 421.
[32] Daily State Journal, vol. I, No. 19 (Feb. 19, 1870).
[33] Texas Constitution (1869), art. IX, sec. IV.

the localities, "when in their opinion, the harmony and success of the schools require it, to make any separation of the students or schools necessary to insure success * * *." [34] The report of the committee that recommended adoption made it plain enough that it was intended to establish segregation on the local level.[35] Segregated schools were required by the 1876 constitution,[36] and that requirement has been continued.

Vermont ratified in 1866.[37] Throughout the proceeding no mention was made of the school problem. But Vermont seems never to have had segregated schools, and it had no problem since it had only 924 Negroes in 1870.

Virginia refused to ratify in 1867. There were no favorable votes in the Senate and only one in the House.[38] There was no mention of public schools in the proceedings. Ratification followed Reconstruction at the 1869–70 session of the legislature.[39] In 1869, a constitution was adopted which made no reference to segregated schools, but in 1870 the same legislature which ratified the 14th amendment provided for segregated schools and resisted every effort to strike this provision from the school statute.[40] On Virginia's statute books this has been the law ever since.

West Virginia ratified in 1867,[41] and the same legislature only 6 weeks later adopted a statute providing that "white and colored persons shall not be taught in the same schools * * *." [42] In 1872 a new constitution was adopted. It required segregation in the schools,[43] and West Virginia has continued that provision ever since.

Wisconsin ratified in 1867.[44] There was no reference in the proceedings to segregated schools, but it was immaterial anyway since Wisconsin never had segregation in its schools, and in 1870 had only 2,113 Negroes to segregate.

CONCLUSION

The foregoing summary seems conclusive that the Congress which initiated the 14th amendment did not believe that it barred segregation in the public schools, and that in not one of the 37 States that considered the amendment is there substantial evidence to indicate that the amendment was deemed such a prohibition.

The Supreme Court of the United States on March 20 of this year decided a case involving an interpretation of the amendment by a careful examination of the constitutions of the several States at the time of the amendment's adoption, and felt bound thereby.[45] It, therefore, approves that method of interpretation. However, all of the material above cited and more, was supplied to the Court in the school cases, but was held by it to be "inconclusive." [46] Surely we have the right respectfully to differ when the evidence is so overwhelming and irrefutable.

There are only two possible ways of restoring the original meaning of the 14th amendment: by the reversal of its position by the Supreme Court itself or by action of the Congress and orderly amendment. The first seems out of the question since the Court has adopted the policy of committing new Justices to the rule laid down in the school cases as they take their places on the bench.[47] The remedy, therefore, is in the hands of Congress alone.

Again, I wish to thank you gentlemen for the opportunity of appearing before you.

Mr. MAYS. I would like to summarize the statement and make a very few comments.

Senator KEFAUVER. Yes, please proceed, Mr. Mays.

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[34] Texas General Laws (1870) 118.
[35] Texas S.J. (1870) 482.
[36] Art. VII, sec. 7.
[37] Vermont S.J. (1866) 75; Vermont H.J. (1866) 140.
[38] Virginia H.J. (1866–67) 108; Virginia S.J. (1866–67) 103; Virginia Acts (1866–67), ch. 46.
[39] Virginia H.J. (1869–70) 36; Virginia S.J. (1869–70) 27.
[40] Virginia Acts (1869–70), ch. 259, sec. 47; Virginia S.J. (1869–70) 485, 489, 507; Virginia H.J. (1869–70) 606–607, 615.
[41] West Virginia S.J. (1867) 24; West Virginia H.J. (1867) 10.
[42] West Virginia Acts (1867), ch. 98.
[43] West Virginia Constitution (1872), art. XII, sec. 8.
[44] Wisconsin S.J. (1867) 119; Wisconsin H.J. (1867) 223.
[45] *Bartkus* v. *People of the State of Illinois*, 27 L.W. 4233.
[46] *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, 489.
[47] *Cooper* v. *Aaron*, 3 L. ed. 5, 18.

Mr. MAYS. Senator Robertson has referred to me in more than one capacity, but I appear here today solely in the livery of the Virginia Commission of Constitutional Government, of which I have the honor to be chairman.

Senator KEFAUVER. Would you please enlarge a bit on what the Virginia Commission on Constitutional Government is.

Mr. MAYS. I might say, sir, that that commission was set up by virtue of a Virginia statute in 1958, adopted in 1958 at the instance of the Governor. The purpose of that commission was not to deal with the school subject as such insofar as any litigation is concerned; it was not to deal with statutory enactments in our general assembly dealing with the school question, but to deal with the broad constitutional principles which we think ought to be brought to the attention of our people and the people of our country generally.

We have followed that admonition; we have not been involved in any school litigation. We have not been present in the General Assembly of Virginia in any of that legislation dealing with the minimizing effect of the Supreme Court decision. We have confined ourselves to a general presentation of constitutional principles.

I might say, sir, that my law firm was one of those engaged in the school cases which were decided by our Supreme Court of the United States in 1954. At that time the Supreme Court asked us to make an examination of what had happened in the several States and in the Federal Government in order to ascertain what was the interpretation of the 14th amendment with reference to schools at the time of its adoption.

We did that in great detail. We put a staff of men to work in the New York Public Library, the Library of Congress, and various places, and they worked for many weeks and summarized that information for the Court.

What I present here today is a summary of that summary, and it shows, first, Mr. Chairman, as you well know, that the Congress of the United States understood the 14th amendment did not apply to public schools, and proceeded to have segregated schools itself in the District of Columbia.

When we turn to the 37 States which dealt with this subject, if you will notice, beginning on page 4 of my statement and extending down to the conclusion on page 20, we have a summarization of the actions and attitudes of the State on this subject in alphabetical order. There is not any question at all that it was clear both from the standpoint of the Congress and the legislative bodies of the several States in the 1860's and 1870's of the last century that the 14th amendment had no application to the schools at all.

We argued that to the Supreme Court of the United States fully.

I might say it was argued but never heard.

But I submit, sir, that there are no facts to be added in any of the official records of the legislatures of the different States which controvert the things which are set forth here. I believe it is a fair summary. It is not a full summary, but it does not exclude any relevant matter that might be on the other side, except here and there from a stray statement made by somebody in the State, but not by anybody in authority.

It seems to us—and I mean my commission, and we speak for many people in Virginia—that it is time for us to go back and take a look at the 14th amendment insofar as school segregation is concerned, in the light of what the people thought at the time of its adoption. And we are satisfied that if one does that and is not trying to reach, in advance, a conclusion as to what it means but will look at what our forefathers said it meant, then we need to do something in order to put us back where we were at that time.

I am not talking about turning the clock back; I am talking about construing a constitution.

We, in Virginia, at the time we adopted the Federal Constitution had the reservation which really looked to secession. New York had the same thing; Rhode Island had the same thing.

I mention this because there was grave fear, as you know, in 1787 and 1788, at the time of the adoption of the Federal Constitution, as to where it might take us, and we reserved the privilege, or thought we did, of getting out. I am very happy we are not out. But I think that when the States have entered into this compact, that the compact they thought they entered into should be respected unless the Congress and the States change the Constitution by orderly amendment.

Now, I know that argument is one that is old. So are the Ten Commandments and so is the Sermon on the Mount. And the fact that the thing is 100 years old does not mean it is bad.

Now, to put the Constitution back where it was. There are only two ways of doing it, as I mentioned in my conclusion. One is to have the Supreme Court change its opinion, which it has done from time to time on other subjects and on this one. That is hopeless, because in the case of *Cooper* v. *Aaron*, which was decided only a short time ago, the Supreme Court saw to it that the new Judges who would come on the Court were sort of pledged to follow its rulings. And so it seems that we have the precedent now or the practice of having the Judges almost hold up their right hands at the time they come on the Court in order to subscribe to the *Davis* and *Brown* cases.

So the only way out, as I see it, is by an orderly constitutional amendment originating in the Congress and ratified by the States. I see no other possible way.

I think, sir, that very briefly summarizes my prepared statement. I did not come with the idea of adding to the arguments, and I know I could not add to the eloquence of some of those who have gone ahead of me. But it seemed that this information would be worthwhile to your committee. I think it is conclusive, sir, and I am ready to stand on it.

That is all I have to observe, Mr. Chairman.

Senator ROBERTSON. Mr. Chairman.

Senator KEFAUVER. Senator Robertson.

Senator ROBERTSON. My friend was very modest when, in conclusion, he said that he did not flatter himself that he could add to the arguments that had previously been presented to this committee on the subject that the 14th amendment did not contemplate Federal control of public education in the States. I hope all Members of the Senate will read this brief, because I have not seen a clearer, more comprehensive statement of the fact that we feel is, from a legal standpoint, clearly established, that no one framing the 14th amend-

ment, ratifying the 14th amendment, or passing on the 14th amendment at the time it was presented had any idea at all that it was to apply to Federal education.

Now, there is just one other point I wish to emphasize in that connection, and that is this. Mr. Mays has referred, of course, to the fact that all new members of the Supreme Court are almost forced to hold up their hands and endorse the 1954 decision in *Brown* v. *The Board of Education.*

Seventeen of us, as you will recall, voted against Mr. Stewart because he just openly said he endorsed that decision. We felt he had a closed mind on it and his views were greatly contrary to what we think is the proper interpretation. Seventeen of us went on record. But it was a futile gesture.

Now, I want to emphasize the fact——

Senator KEFAUVER. Senator Robertson, I voted for the confirmation of Justice Stewart, and my recollection was that in the Judiciary Committee, when he was asked about his opinion of the *Brown* v. *The Board of Education* case, he took the position that he was discussing any decision that he had written or participated in, but that he did not feel that he should discuss any decision that was taken when he was not on the Court and in which he did not participate. He believed that such discussion might either disqualify him or make it embarrassing for him to participate in future cases.

Senator ROBERTSON. Well, I am glad to know that that was the official position of the committee. I had heard——

Senator KEFAUVER. I mean that was his position.

Senator ROBERTSON. I have heard and read the minority reports signed by Senators Eastland and Johnston, and I gathered the impression from them that he was committed to the principle announced by the Court in *Brown* v. *Board of Education.* That was their view and that was the ground on which they had voted against his confirmation.

In any event——

Senator KEFAUVER. That was not my impression. I was there for most of the hearings; and, anyway, that was the position that he took on it at the time I attended the hearings.

Senator ROBERTSON. That would be a position that I could not criticize. But I was under the impression that he had done what Mr. Mays said had seemed to be the recent practice that those that went on the Court are in full sympathy and in accord with what had previously been done on that particular issue.

I was just trying to bring up into proper focus the fact that apparently all the emphasis in the Chief Justice's decision in *Brown* v. *Board of Education* has been put on *Plessy* v. *Ferguson*, and that was a case decided many years ago, to which the Court referred, making some reference that they did not know how much that Court knew about sociology and matters of that general character, and said, in any event, they could not turn the clock back to the date of *Plessy* v. *Ferguson.*

I want this record to show that a unanimous Court, in 1927, in the case of *Gong Lum* v. *Rice*, 275 U.S. 78, approved the holding of the Court in *Plessy* v. *Ferguson.* Now, that Court was headed by Chief Justice Taft, who previously had been a member of the circuit court

of appeals, who had been President of the United States and had been a law professor at Yale, and he concluded a very distinguished career by being Chief Justice of the United States. And these were the great Justices under him: Holmes, Brandeis, Stone, Van Devanter, McReynolds, Sutherland, Butler, and Sanford.

They unanimously decided in that case two very pertinent questions. One is that on the question of the power of a State to segregate students on the basis of race—mind you, this was a Chinese girl that was involved—this Court, headed by Chief Justice Taft, on which all these distinguished men served, said without any question that that was an exclusive jurisdiction of the States and there was nothing in the 14th amendment or anywhere in the Constitution that gave the Government any power of control.

The second issue was: Was the constitutional right of that girl denied on the ground that she could be segregated if given a facility in a segregated school equal to that enjoyed by the white children of another school? The Court held that she had no constitutional ground of complaint of being segregated if the facility was equal to the whites; and the Court said it was equal in that case.

So many people have overlooked the fact that in 1954 the Supreme Court, in holding that the 14th amendment required desegregation in all public schools (and in doing so, we say, rewrote the Constitution) not only overlooked *Plessy* v. *Ferguson*, which was a case of long standing, not only overruled all State decisions on the point, all the Federal courts on the point, all State constitutions on the question, but also the relatively recent case of *Gong Lum* v. *Rice*, which, as I say, was decided in 1927.

So, that is our answer to the question of whether or not you have to accept, without question, a decision of the Supreme Court as being the supreme law of the land, when the Constitution says the supreme law of the land is the Constitution, the acts of Congress and the treaties that have been ratified by the Senate.

Therefore, we say that a decision of the Supreme Court of the United States, even though it binds the immediate parties to it until there is some revision of the ruling and binds the lower court to a large moral degree, it does not bind itself, and it can tomorrow, if it sees fit, reverse its decision in *Brown* v. *Board of Education*, just as it had reversed years and years of decisions interpreting the 14th amendment differently from that decision.

Hence, we feel that we are justified in using all legal means to bring about, in some appropriate way, a reversal of that decision, which we feel has improperly interpreted the Constitution.

We are asking that this issue now be submitted to the people of the United States in the form of an amendment, because, as I said in my opening statement, it involves what we regard as one of the cornerstones of our enterprise system, of our democracy and of our Republic, namely, a Federal Union composed of separate soverign States, and those States shall have all the rights under the Constitution that were not specifically granted to the Federal Government or denied to them.

Thank you, Mr. Chairman.

Senator KEFAUVER. Thank you, Senator Robertson.

Mr. Mays, this is a very interesting summary of the history of the 14th amendment. Has it been printed? I mean the larger study?

Mr. MAYS. It is in legal briefs.

Senator KEFAUVER. In legal briefs?

Mr. MAYS. Yes.

All of that and considerably more was before the Supreme Court when those cases were decided.

Senator KEFAUVER. The question has been raised here time and again, particularly by Senator Dodd, as to what the effect of Senate Joint Resolution 32 would be if it should be adopted.

Do you think, Mr. Mays, it would take us back to 1896 and *Plessy* v. *Ferguson*? Would we return to the rule in that case of "separate but equal," or would we go back prior to the adoption of the 14th amendment?

Mr. MAYS. I have not made the type of analysis which would make my answer to that worthwhile for the committee. It seems to me, however, that my impression of it is that it would leave the matter entirely to the States. It would take us back, therefore, before *Plessy* v. *Ferguson*.

Senator KEFAUVER. You mean it would take us back to the place where there is no requirement of "separate but equal," before *Plessy* v. *Ferguson* or *Gong Lum* v. *Rice*, to which Senator Robertson referred?

Mr. MAYS. My impression is it would take you back before that.

Senator KEFAUVER. In other words, it would completely exempt schools from the operation of the 14th amendment?

Mr. MAYS. That is right.

Senator KEFAUVER. Well, do you think we should do that, Mr. Mays?

Mr. MAYS. I think it is far preferable to do that than leave the law in its present state.

Senator ROBERTSON. Mr. Chairman, if I may offer a suggestion on that point, the final wording of this resolution will be in the hands of the committee in case it wishes to make a report on the resolution.

Now, I can find no indication whatever in Virginia—and we have, like we were in the War between the States, been the battleground; they opened up on us, and they have given us more warfare than anywhere else—any indication that they do not desire to give equal facilities for the education of everybody in the State.

My opinion is that all the Southern States are perfectly willing to go ahead under a program of separate but equal facilities for the two races, and of course if this committee saw fit to amend this pending resolution to that extent it would still be far better from our standpoint than the situation now is, and it would give education; whereas, we are convinced that the ultimate result of the existing situation not only is to greatly impinge upon the opportunities of education for white children, but if the South is forced into private schools it means no education of the majority of the colored children of the South, who cannot afford the private schools. We have been hard pressed in the South. In most Virginia communities colored people do not pay one-tenth of what it costs to provide schools comparable to the white schools and teachers. In most communities we have met that test. There are some places in Virginia now where the high

schools for the colored are better than anything the whites have. But we just did not think that the 14th amendment, properly interpreted, had anything to do with schools, and that is why those who were responsible for the drafting of this resolution, as Mr. Mays has said, presented it.

Senator KEFAUVER. I thought the Supreme Court, in cases decided long before the *Brown* v. *Board of Education*, had proceeded on the premise that the 14th amendment did have something to do with education. For instance, in the *Gaines* case a Negro student wanted to go to law school in Missouri. The Missouri authorities took the position that they would pay his tuition and expenses and send him to law school in some other State. The Supreme Court held that this did not satisfy the 14th amendment, and that they had to furnish him facilities in the State of Missouri.

Do you not believe, Mr. Mays, that the Federal Courts for a long time ever since the *Slaughter-House* cases, have applied the 14th amendment to schools?

Mr. MAYS. They have applied it; but I think your initial question was, Senator, whether or not, in my view, it would go back beyond it, and I think it does. I think that either the terms of the proposed amendment are sweeping enough to go back prior to that time or they left the door open for the Supreme Court to go ahead and construe it in the light of the 14th amendment anyway. I do not know which. I do not know whether this amendment, if that is their purpose, is necessary to take the 14th amendment and stomp on it in terms or not. I realize that there is that difficulty in the matter of interpretation.

Senator KEFAUVER. Of course there has been much discussion here about matters of race and public education, but Senator Dodd raised an important question the other day with reference to matters of religion and public education, which largely have not occurred in the South. They have occurred in northern or western States. Do you think, Mr. Mays, that, under this proposed amendment, if a State or local community decided on a religious test for admission to public schools it would be exclusively a State matter?

Mr. MAYS. I have not thought of it as such, but I have not given consideration to it.

Senator KEFAUVER. The case usually referred to is the *McCollum* case, which came up in Illinois.

Senator ROBERTSON. That case is where the court did not want the Bible read in schools.

Senator KEFAUVER. That is right; it said that children of different faiths went to the schools, and under the separation of church and State, religion could not be taught.

Senator ROBERTSON. My recollection—I have not read the case for a long time—is that all they were doing was to read the Bible in the morning session, and the court prohibited that. I thought the court was wrong, but of course I was not on it and I could not reverse it.

Senator KEFAUVER. This case was decided sometime back. What was the year of this decision?

Senator ROBERTSON. It has been in the last 10 years.

Senator KEFAUVER. It is *McCollum* v. *Board of Education* (333 U.S. 203). The holding is that the 14th amendment applies to schools as far as religious matters are concerned.

Senator ROBERTSON. As far as I know, all State constitutions have in their provisions what is in the first amendment of our Constitution about freedom from any religious tests, and separation of church and State is not only in our Federal Constitution but, as far as I know, all State constitutions; and I think it is rather a moot question as to whether or not this proposed change in the Constitution would involve the wiping out of the separation of church and State. Certainly nobody connected with the drafting of the amendment had that in mind.

Senator KEFAUVER. Of course, I certainly feel, as you do, as to moral values in the schools it would be a mighty good thing.

Mr. FENSTERWALD. Senator Robertson, just so we get the record straight on this, I would like to ask you two questions that Senator Dodd has asked of the other witnesses.

Senator ROBERTSON. All right.

Mr. FENSTERWALD. One was concerned with the question whether Alaska and Hawaii and several other States have greater control over their schools than, say, the State of Virginia. Is it your position that these States, which have been admitted with specific language in their acts of admission, do have more exclusive control?

Senator ROBERTSON. I certainly make that statement, and I made it in my opening statement. Because, under the 14th amendment, fifth section, Congress was given the power to implement it, and Congress had the power to interpret whether or not the 14th amendment applied to education.

Some several years ago I introduced a resolution which was referred to this committee in which I said Congress interprets the 14th amendment to mean that States are not prohibited under the 14th amendment from operating schools that are separate but equal.

Now, that was my amendment. That never came out of the committee.

When Congress legislates on a constitution for a State by necessary implication it legislates on that phase of the 14th amendment and that decision, and Congress can legislate or overrule a decision of the Supreme Court. There is not any question about that. And Congress has passed a law that all other interpretations of the 14th amendment notwithstanding, those two States shall have control over education, which we are denied in Virginia.

Mr. FENSTERWALD. In other words, you feel that the acts of admission of these States are not subject to the 14th amendment as interpreted by the Supreme Court?

Senator ROBERTSON. On the phase of the school issue, that is right.

Mr. FENSTERWALD. I just wanted to clarify this point for the record.

Senator ROBERTSON. That is my position.

Senator KEFAUVER. Mr. Mays, do you wish to express an opinion?

Mr. MAYS. No, sir. I have not studied the enabling acts, and I have not gone into that because I have confined myself purely to the data which I have had in my written presentation. I would not comment on a statute without careful study.

Senator KEFAUVER. I think it should be pointed out, however, that in the *Tidelands Oil* case it was pointed out that when Texas came into the Union it reserved offshore rights out 9 or 10 miles. Nevertheless, the Supreme Court said—notwithstanding that reservation—when Texas came in, it came in on an equal footing with all other States.

Is there anything else, Mr. Fensterwald?

Mr. FENSTERWALD. I have only one other point that I want to be clear in the record. Senator, is it your opinion that the 14th amendment was not applied to the school situation until the 1954 decisions? I thought somewhere in the record you had said that the 14th amendment, as it was drafted and as it had been applied in 1954, had not been applicable to the schools.

Senator ROBERTSON. Not been applicable to the point of desegregation.

Mr. FENSTERWALD. I see.

Senator ROBERTSON. Commencing in 1896 with *Plessy* v. *Ferguson*, confirmed in 1927 in *Gong Lum* v. *Rice*, the Court held that, while the 14th amendment did not confer upon the Federal Government any authority to tell the States that they could not segregate on the basis of race, a segregation based upon separate but equal was no violation of the 14th amendment.

Now, I will read you the language of Chief Justice Taft on that point. He does not say what the Constitution requires, he says what it does not prohibit. Now, here is the way he stated it:

> The question here is whether a Chinese citizen of the United States is denied equal protection of the law when he is classified among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow, or black.

He says, no, if that is the situation, he has not had any constitutional rights violation.

Mr. FENSTERWALD. I just wanted to be sure that the record was clear on that.

Senator ROBERTSON. We do not claim that the 14th amendment has not been construed since 1896 to require equal facilities; we do claim that in no decision before 1954 was the 14th amendment construed to mean you have got to desegregate.

Mr. FENSTERWALD. Thank you very much, Senator.

Senator KEFAUVER. Mr. Mays, we are very grateful to you for coming here and presenting your statement.

Mr. MAYS. Thank you, Senator.

Senator KEFAUVER. We would be glad for you to stay here with the subcommittee, Senator Robertson.

Senator ROBERTSON. I will stay here a little while. I have another appointment coming up. I know I shall hear an interesting discussion from the other side on this.

Senator KEFAUVER. The committee is very glad to welcome Senator Jacob K. Javits, a distinguished Member of the Senate from New York and former attorney general of the State of New York.

Senator JAVITS. Thank you, Mr. Chairman.

Senator KEFAUVER. Senator Javits, you have a statement which you may handle as you wish. All the statement will be printed in the record.

STATEMENT OF HON. JACOB K. JAVITS, U.S. SENATOR FROM THE STATE OF NEW YORK

(The prepared statement of Senator Javits is as follows:)

This subcommittee is presently holding hearings on a constitutional amendment (S.J. Res. 32) to reserve to the States exclusive control over public schools which is remarkable in that it seeks to turn back the clock of American progress in equal rights more than 100 years.

I think that we are all aware that what is at stake here is not control of the schools as such. The real issue at which this joint resolution proposing an amendment is directed is whether the States will allow every citizen the same right to enjoy the equal protection of the laws—to enjoy a school system financed by everyone's taxes—or whether they will be permitted to discriminate between certain citizens because of their race. Administration of the schools, to which this amendment refers, has never been involved in these Supreme Court cases which involve desegregation; the States and the local school authorities control the curriculum and the pedagogy, the teachers, the pay, the buildings, everything else. The only thing that they do not control is the right to bar certain children for no other reason than that they belong to a racial minority. If that is to be called an interference with local administration, it is stretching to the breaking point the meaning of the term.

What this amendment seeks to do is to hack out of the 14th amendment which guarantees the equal protection of the laws to every citizen, one area of public activity—education—to which the rights guaranteed to all our people shall not apply.

This is a step which goes much further than the traditional position of those who oppose the granting of equal rights and protections to all of our people, because of color, religion, or national origin. It is an attempt to take us back to the times before the Civil War—back to the time of conflicts which almost split our Nation apart, which the 14th amendment was adopted to prevent in the future.

Let us look specifically at what this amendment is intended to do and whether it would even accomplish its desired ends. It deals with "administrative control" of the public schools. Now we shall know that its intent—and the authors have stated so publicly in these hearings—is to prevent the Federal courts from enforcing the constitutional right to attend public schools without segregation. The amendment would vest in the States exclusive administrative control over their schools; and that is a rather wide term. To the extent that the amendment gives the school authorities the power to administer their schools, in a legal, proper manner, they are getting nothing new—they have that power, and there has never been an attempt to interfere with it. And to the extent that it deals with the legalization of discrimination which is now illegal, it is doubtful if it really gives that power. For is activity by a school board, or by a State, which excludes pupils on the basis of meaningless criteria part of the administrative process? I doubt very much whether one would class under "school administration" or "administrative control" activity by a school board or a State which is otherwise improper just because it takes place within or in connection with a school. If a school principal embezzles school funds from a national bank, or if a teacher sells narcotics within the school, or a school board decides to teach and advocate the overthrow of the U.S. Government in its classrooms, is that a matter which is termed "administrative control," with which there can be no interference? I doubt it very much. And I doubt if the authors of the bill would want the Federal Government to be precluded from dealing directly with such matters where a Federal crime has been committed.

The reason that such broad indefinite terms as "administrative control" are used in the amendment, I suspect, is that "local administration" has a very nice sound to it—even though it might include all sorts of unintended areas. I would think that if the amendment were drafted to deal specifically with the problem with which the sponsors are concerned—if it said that nothing in the Constitution shall deny the States the power to exclude children from equal rights in public education on account of their color, which is the only thing involved in this proposal—then we could see how the Nation would rise up in opposition. I believe that Americans generally will not tolerate such outright discrimination and such outright denial to one group largely in one section of the country of the rights which are essential to human dignity and equal stand-

ing before the law. The real purpose of this amendment is to nullify the decision of the Supreme Court in *Brown* v. *Board of Education*. It may be a convenient rallying point for Senators who want to nullify the decision but it is hardly a major constitutional amendment in the great tradition of the Constitution.

I think that one of the most significant things about this proposal is the approach which the sponsors have taken. By introducing a constitutional amendment to accomplish their purposes they have certainly admitted that under the Constitution as it stands at present they cannot avoid the mandate of equal opportunity in desegregating public schools. I think that in that respect the sponsors are to be congratulated. Perhaps their lead in attempting to accomplish what they want in the only proper and legal way will discourage the lawless approaches to the problem which have been exhibited in a number of communities where the intimidation by riot and bombing have been the means used by some of those seeking to escape obedience to the supreme law of the land. But the fact that this may be the only legal means to change the constitutional rights which are involved in desegregation of the schools obviously does not mean that it is wise or necessary, or even remotely acceptable.

I also wish to comment briefly on one of the major arguments that the proponents of this measure and, as a matter of fact, the opponents of desegregation generally make: That the subject of education is nowhere mentioned in the Constitution, and that therefore it was specifically reserved to the States under the 9th and 10th amendments.

This statement was recently made by the principal sponsor, when he stated: "* * * schools were never determined to be Federal matters. They are specifically reserved to the States under the 9th and 10th amendments." Now here are the fallacies in this argument: First, the fact that the 14th amendment has meanwhile been adopted is ignored. Second, the decisions of the Supreme Court did not hold education to be a Federal matter—it held that, as State matters, they fell within the provisions of the 14th amendment which prevent States from denying equal proection of the laws to their citizens. Third, our Constitution is great and has endured because it is adaptable to the changing times in which we live. Only by this fact has the structure which our Founding Fathers established survived the changing times which must be in today's world, so far beyond their wildest imaginations.

The Constitution rarely deals with specifics—it deals with areas of activity—it deals with general powers and restrictions on power. Nowhere is there a mention in it of atomic energy, airplanes, automobiles, housing programs, or agricultural price supports. But in the exercise of the powers which do exist, they have been applied to these areas, too, as we hope they will be applied to outer space and other new areas of human activity as they develop. There is no mention of education in the Constitution—but in 1789, when the Constitution was adopted, and in 1868 when the 14th amendment was ratified, this was not an issue which was to be treated differently from the other areas of constitutional rights. Just the opposite of what the sponsors infer from the absence of specific mention is true. The 14th amendment applies to all State action, and to exclude education would have required a specific exclusion.

I believe that no good can come from this amendment—and that even the reporting out of this proposal to the floor is no service to our Nation. For even if it is soundly defeated, as it deserves to be, it will be interpreted in our country and in the rest of the world, as some senatorial endorsement of inequality for some of our citizens. Whatever may be its words the intent of this amendment is clear to all the world. This we cannot endure.

I also want to make one short reference to a proposal which is now pending before another subcommittee and which has been discussed by the sponsor of the pending amendment. This bill, S. 1593, is intimately related to the proposals contained in this constitutional amendment, becaues it deals with the same desire to take away power, and the same implicit admission therefore that the power exists as is contained in this amendment. This bill provides that no Federal court shall have jurisdiction over cases dealing with public schools, and it can only be characterized as "court raiding" of the first order, because it deprives the courts of the United States of jurisdiction over matters relating to equal rights as they arise in the administration of the public schools. This would be an exercise of naked power by the Congress but of a power the Congress does have. It is an attempt through another means to accomplish what this amendment is

aimed at—the deprivation of the equal rights guaranteed under the Constitution in one specified area of public activity.

It is for this reason that I am, together with seven other Senators of both parties, the sponsor of a constitutional amendment, S.J. Res. 57, which would prevent just this type of "court raiding." It would protect the appellate jurisdiction of the Supreme Court in constitutional matters and prevent the type of proposals contained in S. 1593, and part of last year's Jenner-Butler bill and similar measures. It seems to me that the national interest far more urgently calls for hearings on that measure than on the amendment now before this subcommittee. I strongly urge that this subcommittee, which has that constitutonal amendment before it, schedule early hearings on that measure, which I consider vital to the preservation of our traditional separation of powers.

Senator JAVITS. Mr. Chairman, I shall deal with the subject pretty much as I have in the prepared statement, but I shall, of course, not read the whole statement.

Mr. Chairman, I think we all understand the real issue, whatever may be the words of the amendment. And perhaps the words of the amendment will not in any way accomplish what its authors believe it will.

The real issue is whether the States will allow every citizen to enjoy the same rights to equal protection of the laws or whether they may discriminate between certain citizens because of race and give them—which is the best that can be said for it—separate but equal facilities.

I think two things must be made very clear at the outset. First, that administration of the schools was never involved in the case of *Brown* v. *Board of Education*. The Supreme Court has gone to great pains to make that very clear. The only thing the Court decided is what a State shall not do, not what a State must do.

In short, all questions of curriculum, pedagogy, teachers' pay, buildings, everything about schools, the Court did not touch. The Court did not even tell States what they had to do. They just said you cannot spend taxpayers' money and deny admission of a Negro to a school because you want to keep that school solely for people who are white.

The second point which I think is very important is the one which I was very glad——

Senator KEFAUVER. I wish you would enlarge upon this point, Senator, about the administration of schools.

Senator JAVITS. Yes; I believe my reason for saying that the amendment is very unlikely itself to accomplish what it seeks to accomplish, though we all know what it seeks to accomplish, is because it uses the words of art "administration" or "administrative control." Those are the two words of art in the amendment.

I do not think that administration or administrative control has ever been brought into question—the States today have administrative control of their schools—in any way that is not inconsistent with the fundamental constitutional rights of everybody in the United States. And I think that is borne out by the point which I make in my statement and which I was very glad to see that Mr. Mays conceded to be the fact.

This amendment, taking its intent rather than its words, will take us back to the time before the 14th amendment. That is the intent. I do not think there is any question about that. It will take us back before the time when citizens of the individual States were, in respect

of their constitutional rights, put under the Constitution of the United States as the supreme law of the land. I think it is very clear that it would also obviate the doctrine of *Plessy* v. *Ferguson*. A State could give unequal facilities, or a State could give Negroes no education if the intent of this amendment were carried out.

In other words, if only the words of the amendment were to be carried out, in my opinion the amendment is meaningless, because there is no administrative control over schools asserted in the Constitution, nor was it asserted in *Brown* v. *Board of Education*.

And I think that also immediately takes in the question of the reservation of 12 of the States who have reservations in their acts of admission or whose acts of admission provided for exclusive control over schools. Again this is not in issue. Nobody is interfering with their administrative control over their schools. The only thing that the Supreme Court is saying—that the paramount law says—sure, control your schools anyway you like, but do not deny to citizen A what you give to citizen B. I do not believe that that comes within the purview of the idea of administrative control.

Senator KEFAUVER. Senator Javits, you mean that, technically speaking, what this amendment says is the law of the land today?

Senator JAVITS. I do.

But as I say, I feel, as does the Senator from Virginia, that this subcommittee and the Judiciary Committee are both seized of an amendment, the purpose and intent of which we know. As a matter of fact, I would say this. I think if this amendment were adopted by the Congress and by the people with its present text, I have little doubt that the Supreme Court would construe it in accordance with its intention rather than in accordance with its words. In my opinion, its words accomplish nothing in terms of changing this situation; but its intentions obviously do exclude questions of education from the protection which the individual has under the 14th amendment.

I think this perhaps makes the distinction very clear. The 14th amendment deals with the opportunity of the individual for an education. The administrative control of schools deals with the governmental authority's control over school systems and school personnel and school operations. In short, the objects of legislation are different in each case, though in each case the other entity is affected.

In protecting the rights of the individual to equal opportunity and education, we obviously affect the school system. And so the other way around; in controlling the administrative control of schools we affect the individual.

But this is not the object of the legislation. That is why I say that the words "administrative control" do not hit the target at which the drafter of the amendment is aiming.

But, nevertheless—and I am here opposing it—it cannot be dismissed so simply, because when the people act in the very deliberate way in which a constitutional amendment requires, I believe that the courts will go far out of their way to carry out the intention of the drafters even if the words do not carry out that intention.

This is, of course, a supposition on my part, but I believe it is warranted.

Mr. FENSTERWALD. Senator, is it your position that administrative control does not include admission to the schools?

Senator JAVITS. Administrative control does include admission to the schools. I point out, however, that administrative control encompasses dealing with school systems and school operations; whereas the decision in *Brown* v. *Board of Education* dealt with the individual's opportunity to get an education.

As I said before, they interact one upon the other; but the objective is different in each case, as is the objective of the decision, when contrasted with the objective of this amendment.

I think that one other thing is very important in this matter; as you get into this subject of administrative control you are faced with these questions:

Is activity by a school board or by a State which excludes pupils on the basis of meaningless criteria—for example, what the chairman spoke of—religion, how tall or how short you are, whether you have, conceivably, blond or black hair or no hair, is it part of the administrative process?

In short, if you pass this amendment and either reword it so that it means what the drafters intend it to mean, if that can conceivably be done, or the courts contrue it in accordance with its intent, rather than in accordance with its words; is it not a fact that you simply exclude every aspect of education, both as it relates to the individual and as it relates to the system, from the 14th amendment?

Suppose a teacher sold narcotics within the school, a violation of Federal law? Then what? What has happened to that situation if you exclude administrative control and give it its full intent rather than its literal meaning?

Suppose a teacher decided to teach and advocate the overthrow of the U.S. Government, in violation of the Smith Act? What then? Would he or would he not be amenable to the Smith Act?

If you gave this amendment its intention, rather than its words, he probably would not.

In short, I think what you are trying to do is to hack education out from the 14th amendment. In my opinion, this should not be done. The Congress should not enact any such amendment, and I do not believe it is worthy of submission to the people. I think it would go back to a time before that when, at a cost of tremendous blood and treasure, the people of the United States decided that individuals were not only citizens of their States but citizens of the United States, and therefore entitled to sit in fundamental protections under our laws.

I point out, too, Mr. Chairman, that this is a rather essential point, because it could make living intolerable for certain very large groups of people in particular communities of our country, and this is something that the Constitution is expressly designed to prevent. Certain minimal living conditions are assured to every person in the United States and in any State of the United States. This is the essential aspect of the protection of the individual which is inherent in the Constitution of the United States.

I do not want to detain the committee very long, but I would like to address my attention to one or two of the points which the principal sponsor of this amendment, the Senator from Georgia, Mr. Talmadge, has made in his presentation to this committee, because I think they are important as illustrating the fundamental unsoundness of this whole approach.

The two points which I think he made, and which it seemed to me were the principal points, were: first, that the Congress not the Supreme Court, was authorized to implement the 14th amendment; and that, therefore, as the Congress has not implemented it in respect of this matter of segregated education, it does not apply.

It seems to me that what the Congress has the right and the authority to do is to make laws which will carry out the 14th amendment, but in the absence of a law by the Congress or, as in this case, in its applicability to a State law or a State practice, the fact that the Congress has not legislated does not make invalid or does not nullify the effectiveness of the 14th amendment. The courts have held that time and time and time again.

Suppose a State court or State agency did not act at all, as in respect of education, that does not mean that the citizen would not have the right to equal protection of the law in some other forum. That forum, of course, is the United States and the U.S. courts.

So I do not think that the implementation section deprives the 14th amendment of its efficacy just because there has been no implementing legislation on a particular point. I think the amendment gives Congress the authority to implement if it chooses, but it does not give the Congress the authority to nullify by failing to implement in a particular detail. If it did, then constitutional amendments would not mean anything; they would have no higher status in the eyes of the law and in the structure of our Government than acts of Congress.

The next point is this matter of the reservation or the provision in a particular act admitting a State constituting a treaty between the United States and that State. This is the other point made by our colleague from Georgia upon which I wish to comment. It seems to me that it runs contrary to many decisions of the courts which have held that this is not a treaty; this is not a treaty in the sense of being paramount to constitutional law.

But more important than that, I think the very process itself demonstrates that the act of admission of a State is not superior to the Constitution but that, on the contrary, the State comes in subject to the Constitution. Because the act of admission is an act of the Congress adopted by a majority in each House, whereas the constitutional amendment is an act of the people under the Constitution itself and in the organic organization of the country has superiority.

In short, again, if we adopted this concept, we would give the Congress the opportunity to nullify the Constitution every time it admitted a new State by a form of ratification which is less than the type of ratification which we require for amendments to the Constitution. And again, that would, it seems to me, just tear the whole fabric of our Government apart.

Also and, very importantly, when you read these reservations themselves, they carry out pretty much the same point I made in connection with administrative control.

Essentially, they vest control over their educational system in their respective States.

Again, I repeat, nobody is arguing about that. What people are arguing about in respect of this matter is the denial to the individual of his opportunity for education, and that is protected, in my view, by the 14th amendment.

Now, it is said that the 14th amendment doesn't talk about education. Well, this is the genius of the Constitution. The 14th amendment doesn't talk about atomic energy, or about airplanes, or about automobiles, or about outer space, or about perhaps 20 other things which will be brand new to our world in the days ahead. But, the Constitution has endured because the principles of the 14th amendment are equally applicable to any state of facts with which we are faced, which squares with those principles.

So, I believe that that is not an argument for this amendment.

Finally, I would like to point out, too, that because the South is put out about this matter and that it is perhaps even angry—and when I say "South" I mean a great many people in our Southern States—when you start with this business of hacking things out of the 14th amendment, I would like to know where you are going to stop.

If you hack out education, why can't you hack out the courts? No reason, it seems to me why. Why can't you hack out religion or a dozen other things that some particular section of the country or some particular group of people at some particular time do not like?

I think, really, what we are trying to do, what is being attempted here is, in a moment of great pique in a section of the country, an effort is being made to go back before the Civil War. This is the essence of it, go back before the Civil War; go back to the concept that each State is sovereign and is bound together only by a compact which it can pretty much abrogate at will.

I will say this much for this constitutional amendment idea: If you are going to do that, this is the only way to do it. And at long last, it seems to me, there has been a recognition by a group of distinguished Senators from the South of the fact that the decision in *Brown* v. *Board of Education* is the law of the land and that you cannot argue it away; that it is not an illegal seizure of power by the Supreme Court but, on the contrary, is a perfectly proper and necessary exercise of a court's jurisdiction; and that the only way you can undo it is by changing the Constitution. This is absolutely right, I agree with that.

I thoroughly disagree that it ought to be changed. I think it would tear the country apart and take us back to the divisiveness of America before the Civil War.

If you are going to do anything about this, this is the right way to proceed. I thoroughly agree with that.

But I thoroughly disagree with the measure, its wisdom in terms of the people, or its wisdom in the terms of the Congress passing it.

Mr. Chairman, I would also like to close upon this note:

It is very interesting to me that here is an amendment which I think is very unwise, very unsound in terms of the future of our country, its position at home, and its position in the world, and which got a pretty fast hearing. And I would like to point out that notwithstanding the attacks upon the Supreme Court, the efforts at Court raiding—the effort to take away the Court's appellate jurisdiction—which have been indulged in, the other side of the coin, a resolution to write into Constitution the appellate jurisdiction of the Supreme Court, which I sponsored, together with six other Senators, has been pending before this subcommittee for some time without receiving a hearing.

Now, Mr. Chairman, it seems to me, and I urgently make this plea to the Judiciary Committee, that that side of the case is entitled to a hearing, too, and it is entitled to at least as much dignity and as much receptivity as is being given to the amendment which is before this subcommittee now.

Senator KEFAUVER. Senator Javits, are you referring to S.J. Res. 57?

Senator JAVITS. I am.

Senator KEFAUVER. If you and other sponsors will write the committee as Senator Talmadge and his sponsors have done, you will certainly have a hearing.

Senator JAVITS. I am very grateful to the chairman, and we shall certainly do that.

Senator KEFAUVER. It is my effort to give a hearing to any Senator who has a resolution pending whenever he asks for a hearing.

Senator JAVITS. All right, sir, we will get ourselves ready and do that.

I would like to point out, too, that because it is an important point which I think the people ought to be enlightened upon, that the Congress probably can take away by a law without any constitutional inhibitions the right of the Supreme Court to review constitutional questions either arising from the States or arising in the Federal establishment. Indeed that was attempted in the so-called Jenner-Butler bill—more heavily in the original Jenner bill than in the subsequent Jenner-Butler bill—but even in the Jenner-Butler bill the first section of which sought to take away jurisdiction of cases involving admission to the bar of various States.

Therefore, when the Supreme Court is under atttack, as it is now, it seems to me that it is a very pertinent inquiry as to whether its jurisdiction in this matter ought to be assured by the Constitution of the United States. Mr. Chairman, that is a somewhat side issue at the moment. It relates only to the question of a hearing.

I would like to summarize my views in respect to this matter which is before us now as follows:

I believe that the words of this amendment do not accomplish the purpose of its authors but do illustrate the issue as being not one of administrative control of the schools but of the individual's rights to an education equally with his fellows, whatever may be their color.

That is first.

Second, that if the intention of the authors of the amendment should be carried out, rather than the words of the amendment, this would take us back to a period before the Civil War when the essential unity of the country and the citizenship of the individual in the United States as well as in the State was affirmed at so much cost of blood and treasure. It would start a process by which the whole national fabric could be dissolved through hacking away at the fundamental rights which inhere in the individual by virtue of the Constitution and would, therefore, place a premium not contemplated by our national structure for living in section A or section B or section C of the United States.

For those reasons, Mr. Chairman, I would urge upon the subcommittee, and in turn upon the Judiciary Committee, that the proposed constitutional amendment not be reported favorably.

Senator KEFAUVER. Senator Javits, we thank you very much for coming and giving us your statement.

I wanted to make it clear that this committee has a large number of resolutions before it on constitutional amendments. Senate Joint Resolution 32 is an amendment sponsored by 10 Senators.

The holding of hearings on any of these amendments doesn't indicate the position of the chairman or any member of the committee. To the extent possible, we want to give sponsors of resolutions a fair hearing and consideration to which they are entitled.

If the Senator from New York and his cosponsors on Senate Joint Resolution 57 wish to have hearings on that resolution, as he has indicated here, we will schedule it for the next consideration.

Senator JAVITS. I am very grateful to the chairman.

Senator KEFAUVER. Mr. Fensterwald will work it out with your staff and the staff of the other Senators for some convenient time.

Mr. FENSTERWALD. Might I just add one word, Mr. Chairman: We have had several other requests, and we will attempt to have all the hearings.

Senator KEFAUVER. You mean you have had some requests on Senate Joint Resolution 57?

Mr. FENSTERWALD. No, sir; on other amendments which are pending before the subcommittee. As you will recall, we have had hearings on interstate taxation (S.J. Res. 29 and S.J. Res. 67).

Senator KEFAUVER. That's right, we nave had hearings on the problem of interstate taxation.

Mr. FENSTERWALD. Also, repeal of the 22d amendment (S.J. Res. 11).

Senator KEFAUVER. I had forgotten that. We had a request for hearing on the repeal of the 22d amendment.

Senator JAVITS. I was not finding fault because I think I know the temper of the chairman and so many members of the Judiciary Committee. I was only pointing out that in terms of the impact upon the country, I did feel that we had a right to have a hearing on our resolution in terms of its importance to the United States, at least equal to this one, and I am delighted with the chairman's statement.

Senator KEFAUVER. My feeling is that on matters such as those contained in this resolution (S.J. Res. 32) and your resolution (S.J. Res. 57) enlightened intelligent discussion and increased attention will probably help clarify the atmosphere.

Senator JAVITS. I might point out to the chairman that I had the honor of serving as a two-man subcommittee with Senator Talmadge with respect to the hearing on Senate rule 22. That is the so-called rule of unlimited debate. Both of us were satisfied that immeasurable public education had resulted—as a matter of fact, legislation has resulted. I didn't feel the legislation was meanginful, but, nevertheless, there was legislation, and a majority of the Senate thought it was meaningful enough to support it. I am naturally content with that.

So, there is little question, Mr. Chairman, about our desire, my desire, to try to elucidate this question in debate in the most balanced way.

I welcome very much the chairman's suggestion that we, in a formal way, request a hearing and I will consult with my colleagues who are

cosponsors so that we might get our witnesses ready for such a hearing.

Senator KEFAUVER. Thank you very much, Senator Javits.

Mr. FENSTERWALD. Mr. Chairman, I would like to put in the record at this point, a letter which you sent to the Attorney General on April 24, requesting that he appear this morning and testify on this resolution. I had conversations with the Attorney General's assistant, and he said that the Attorney General did not wish to appear, but that he would send a letter stating his position. We have not received that letter, but I would like permission to put it in the record when we do receive it.

Senator KEFAUVER. Put our letter to the Attorney General in the record. We will put the statement of the Attorney General in the record, when it is received.

Mr. FENSTERWALD. I sent a similar request to the Commissioner of Education. We have received a letter, dated May 12, from the Assistant Secretary, Mr. Richardson, stating the views of the Department of Health, Education, and Welfare. I would like to put that correspondence in the record at this point.

Senator KEFAUVER. Without objection, it will be included.

Mr. FENSTERWALD. Lastly, we have received a letter from Dr. Trytten, who is Director of the Office of Scientific Personnel of the National Academy of Sciences.

I would like permission to put that letter in the record.

Senator KEFAUVER. Without objection.

APRIL 24, 1959.

Hon. WILLIAM P. ROGERS,
The Attorney General,
Washington, D.C.

DEAR MR. ROGERS: On May 12, 1959, the Subcommittee on Constitutional Amendments will begin hearings on Senate Joint Resolution 32, proposing an amendment to the Constitution of the United States reserving to the States exclusive control over public schools. This resolution was introduced on January 27, 1959, by Senator Talmadge (for himself and eight other Senators). A copy of the resolution is attached.

The subcommittee most earnestly desires to have your testimony, as chief legal officer of the Government, on this proposed amendment, and I hereby request that you appear before the subcommittee to give such testimony on the morning of Tuesday, May 14. The hearing will begin at 10 a.m. and will be held in room 457 of the old Senate Office Building.

We will, of course, be interested in all of your testimony. However, I do hope that, inter alia, you will give us your views as to the legal consequences of the proposed amendment if it were adopted.

With every best wish always,

Sincerely yours,

ESTES KEFAUVER, *Chairman.*

APRIL 21, 1959.

Hon. LAWRENCE G. DERTHICK,
Federal Commissioner of Education,
Department of Health, Education, and Welfare,
Washington, D.C.

DEAR MR. DERTHICK: On May 12, 1959, the Subcommittee on Constitutional Amendments will begin hearings on Senate Joint Resolution 32, proposing an amendment to the Constitution of the United States reserving to the States exclusive control over public schools. This resolution was introduced on January 27 by the junior Senator from Georgia for himself and eight other Senators. A copy of the resolution is enclosed.

The subcommittee respectfully requests that you, as Commissioner in charge of the Office of Education, appear before it on the morning of Thursday, May 14,

and testify with respect to this legislation. The hearing will begin at 10 a.m. in room 457 of the old Senate Office Building. It is expected that the first witness that morning will be the Attorney General or his representative. The committee hopes that you can testify second. However, if it is impossible for you to be present that day, we will arrange another time which is mutually convenient.

With every best wish, as always,

Sincerely yours,

ESTES KEFAUVER, *Chairman.*

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
Washington, D.C., May 12, 1959.

Hon. ESTES KEFAUVER,
Chairman, Subcommittee on Constitutional Amendments,
Committee on the Judiciary,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: Commissioner Derthick has brought to my attention your letter of April 21, 1959, inviting him to testify on May 14 with regard to Senate Joint Resolution 32, proposing an amendment to the Constitution of the United States reserving to the States exclusive control over the public schools.

While this invitation is much appreciated, our consideration of the matter has led us to conclude that our views could adequately be presented by means of this letter. We do not, therefore, feel that it will be necessary for us to avail ourselves of the opportunity to testify.

To the extent that the resolution is directed toward assuring that the adminisrative control of any public educational program shall be vested exclusively in the States and their political subdivisions, it is merely declaratory of the existing situation. To this extent, therefore, it would not affect any of the statutory responsibilities in the field of education administered by the Office of Education or by any other agency of this department.

To the extent, however, that the purport of the resolution concerns the practices of any school system, insofar as such practices are affected by existing provisions of the Constitution of the United States, it raises questions on which it is the particular province of the Department of Justice to comment. We understand that you will shortly receive such comments. For ourselves, it is sufficient to say that we wholeheartedly support the decisions of the Supreme Court which have construed the 14th amendment as applied to free public elementary and secondary education.

The Bureau of the Budget perceives no objection to the submission of these views to your subcommittee.

Sincerely yours,

ELLIOT L. RICHARDSON,
Assistant Secretary.

NATIONAL ACADEMY OF SCIENCES,
NATIONAL RESEARCH COUNCIL,
OFFICE OF SCIENTIFIC PERSONNEL,
Washington, D.C., May 11, 1959.

Hon. ESTES KEFAUVER,
U.S. Senate,
Washington, D.C.

MY DEAR SENATOR KEFAUVER: I have learned with interest that Senate Joint Resolution 32 has been proposed and that hearings on this bill are being held this week. I have been personally interested in this measure and would like to send you the following thoughts which have occurred to me arising out of my concern with education, particularly as it relates to an adequate supply of trained manpower for the many activities in our country which demand specialized personnel.

The resolution embodied in Senate Joint Resolution 32 calling for an amendment to the Constitution of the United States would seem to constitute a retrogression. Education has during the past two decades achieved a position of importance in the national life to a degree which is totally unprecedented in our

history. Indeed, education has throughout our history been one of the major dynamics in the rapid development of our civilization and in the improvement of our standard of living. But this matter has suddenly become of central importance in almost every aspect of our lives, whether we think of the economy itself, the welfare of our society generally, or indeed our national security. The foundation of our well-being with respect to all of these rests ever more directly and in larger proportions on an education base.

As one single example of this, let me cite that the Federal expenditures for research and development in the past two decades have been multiplied almost by a factor of 50 to 1. Most of this depends quite directly on national supply of scientists and engineers trained at least to the college level. Yet in the production of engineers we have scarcely more than doubled our production over the past two decades and in the case of scientists we are only producing about 2½ times as many as we did in 1940.

The meaning of these figures is that we are finding more and more need for the exploration, the exploitation, and the application of science, both pure and applied. This need is most conspicuous perhaps in the national security context, but is important equally in our economy and in the fields of health and public welfare.

The sheer fact of the matter is that the limiting factor in what we can do today to meet our burgeoning requirements in all these fields is not money nor the physical requirements so much as it is the trained manpower to do the jobs we feel must be done. We can appropriate money but not trained minds.

This situation, however, is not confined to the sciences. The complexity of modern life is creating problems in human organization and human behavior of unprecedented magnitude and difficulty, as technology continues to revolutionize our way of living. The demands for personnel in the nonsciences adequately trained to cope with problems in human behavior may in the long run be even mor critical and require increased numbers of persons in excess of those needed in the sciences and in engineering.

These are distinctly matters of national concern. This is why, it seems to me, an act of retrogression to consider an amendment to the Constitution which would, in effect, make these matters of concern to the individual States alone. To meet these educational problems it seems necessary to mobilize our human resources on a national scale. We must utilize talent wherever it is, regardless of where that talent may be found. It seems to me at least conceivable that an amendment of this type might result in differential development of talent based on culture, religion, or other factors than the fundamental one, which is the existence of talent.

There is another aspect which seems to me of concern here, too. We stand in our country as leaders of the Western World, but we are to a great extent the focus of attention in the whole world, split as it is between two ways with respect to basic concepts as to a way of life. The decisive part of the world is that part which is at present neither committed finally to one direction nor the other. It is, I think, obvious that we have not done too well in gaining acceptance of our way of life as the better way in this important uncommitted one-third of the world's population.

It is, of course, true that the proposed amendment as written does not speak directly with respect to racial differences. Nevertheless, I am convinced that it would be interpreted as a race discrimination amendment and would certainly be so described throughout the world. The propaganda value of that to our ideological opponents would surely be enormous.

An overt act such as this amendment would seem to me to flaunt before all the world and solidify in our basic document a principle of human inequality which would certainly have a profound negative effect on acceptance of our position as exponents of the better way of life by those areas which are as yet uncommitted and which in the largest measure are composed of many races. I can think of nothing more damaging to our prestige at this critical juncture than changing the Constitution of the United States to demonstrate such a backward step.

Sincerely yours,

M. H. TRYTTEN,
Director, Office of Scientific Personnel.

Senator KEFAUVER. The next witness is Mr. Cecil Sims.

STATEMENT OF CECIL SIMS, NASHVILLE, TENN.

Senator KEFAUVER. The chairman knows Mr. Sims to be a very able lawyer and a fine citizen of our Nation and Tennessee, a thoughtful public servant who serves in a field where there is no competition, I believe.

From "Who's Who," we learn that Mr. Sims is a member of the board of trustees of Vanderbilt University, a member of the board of education of Davidson County, a member of the Executive Commission, Committee for the Board of Control for Southern Regional Education. He is former Tennessee State senator and member of the executive committee of the honorary scholastic fraternity, Phi Beta Kappa.

Mr. Sims, before you start your statement, tell us a little more in detail about your interest in education.

Mr. SIMS. Mr. Chairman, I do not feel that I should enlarge upon my personal efforts in the field of education. I have been a trustee of Vanderbilt University and on its executive committee and its attorney for many years.

I am a trustee of Meharry Medical College, which is one of the two medical colleges for Negro doctors, Negro dentists, and Negro nurses in the United States. I am its attorney and on its executive committee.

I did serve on the county board of education of Davidson County at Nashville, Tenn., for 15 years. I recently retired.

I have been interested in States rights.

You perhaps remember that I tried rather vainly, in the 1948 Democratic Convention at Philadelphia, to get a States rights plank adopted as a minority member of the platform committee.

I am genuinely interested in the South's taking a constructive step whenever one is offered, and I am genuinely interested in opposing one if I think it is unwise or inept, even though it may be offered under the name of a doctrine that is favored in the South.

That is the reason I have prepared a statement here today.

Senator KEFAUVER. We appreciate your coming and testifying before the committee, Mr. Sims. Please proceed.

Mr. SIMS. Mr. Chairman, I feel that certainly sufficient time has elapsed—almost 4 years—since the unanimous but nevertheless startling final decision of the Supreme Court of the United States in the celebrated segregation cases, so that one may make some appraisal of its impact upon public education in the United States, and more particularly in the Southern States, and the effect which it has had upon relations bewteen the white and the Negro races and also makes some judgment with respect to the validity, effectiveness and wisdom of new legislative and constitutional measures proposed to facilitate, hinder, or ameliorate, the application of the Court's decree "with all deliberate speed."

Senate Joint Resolution 32 proposed in the Senate of the United States on January 27, 1959, is one of these measures. It seeks to place an amendment to the Constitution of the United States to eliminate from local, county, State, or city administration of public schools, public educational institutions, or public educational systems, or restrictions of the 14th amendment to the Constitution so as to vest in residents of the various States, cities, and counties the right to deter-

mine for themselves the manner in which any such school, institution, or system is administered by such State and subdivision.

The effect of the amendment is not merely to escape the impact of the recent decisions of the U.S. Supreme Court, by restoring the original interpretation of "equal and adequate facilities" under the Court's previous interpretation of the 14th amendment to the Federal Constitution in *Plessy* v. *Ferguson* (163 U.S. 537) in 1896. It removes from the administration of public schools not only the most recent requirements relating to the integration of the races but also the earlier requirement of equal and adequate facilities for the races as a condition of the legality of segregation. To put it in a different way, the amendment, if it becomes effective, will authorize and permit States, counties, and cities in the administration of their public school systems, not only to discriminate without providing equal and adequate facilities, but to go as far as providing facilities for one race and completely eliminate all facilities for minority groups, if sanctioned by State laws.

It has been said that the prime purpose of the proposed amendment is to restore to the States rights which have been usurped through improper action on the part of the Supreme Court of the United States as a coordinate branch of the Federal Government. Many people, and most certainly including myself, have for years been outspoken for the preservation of States' rights. But it is one thing to insist that the rights not granted to the Federal Government by the provisions of the Constitution were reserved to the States, and quite a different thing to say that the protection of the 14th amendment to the Federal Constitution shall be withdrawn from the administration of the public schools by States and their political subdivisions, primarily because of the prevailing opinion in the South that the Supreme Court of the United States, by an inept decision, has improvidently changed its interpretation of the 14th amendment to the Federal Constitution.

For reasons which I will set out in some detail it seems to me that Senate Joint Resolution 32 is not in the public interest, and that it should not be allowed to pass. The reserved rights of the States is of course sound constitutional doctrine but the withdrawal of all protection of the 14th amendment of the Federal Constitution so as to permit administration of public schools on a discriminatory basis and so as to make it possible to eliminate even the requirements of equal and adequate facilities as a condition for the maintenance of segregated systems will make no contribution to either the speedy or gradual solution of the vexatious problems in race relations as applied to the public schools. This is emphasized by the fact that under the proposed amendment the full protection of the 14th amendment to the Federal Constitution, as recently interpreted by the Supreme Court remains applicable to the integration of the races with respect to public swimming pools, golf courses, hospitals, and municipal bathing beaches, and, I might add, juries, also, pursuant to the per curiam extensions and applications of the public school segregation decisions.

Then, too, Mr. Chairman, if we are going to take from the public schools the application of the 14th amendment but leave it in effect in these other fields, particularly jury service, so that in representing my clients in trying a case, where I have a mixed jury of white and Negro,

I certainly want that Negro to be educated if he passes on my client's rights as they do in many cases.

This amendment leaves in full effect the application of the 14th amendment in many other fields, which includes service on a jury.

Senator KEFAUVER. Excuse me, Mr. Sims, what is the Supreme Court decision in the jury matter?

Mr. SIMS. I do not have it but I think perhaps it originated in the *Scottsboro* case from Alabama. That is my offhand recollection. But it has been applied to the jury and I can find the case if counsel does not.

Senator KEFAUVER. I think it did come from the *Scottsboro* case. I will ask counsel to put in the reference at this point.

(The reference referred to is as follows: *Norris* v. *Alabama*, 294 U.S. 587 (1934); see also, *Strander* v. *West Virginia*, 100 U.S. 303; *Neal* v. *Delaware*, 103 U.S. 370, 397; *Rogers* v. *Alabama*, 192 U.S. 226, 231; and *Martin* v. *Texas*, 200 U.S. 316, 319.)

Mr. SIMS. I could be wrong about it being the *Scottsboro* case.

Several years ago, a group of outstanding southern educators published their composite views under the general title "White and Negro Schools in the South" (Prentice-Hall, 1955), and I agree with the following statements which may be found at the beginning of the book under the heading "Public Education and American Society":

> Change in a democracy is * * * inevitable. In a democratic society man is always striving for something, striving to create new wealth, to compose a new symphony, to right a wrong. Although change is essential to a democracy, it falls within limits which are determined by the beliefs, values, and goals which define individual and social behavior. This means that conflicts can be minimized and that they may be held within healthy bounds. Under these conditions, change is the normal state of a democracy and is its lifeblood. It is always present and its sweep is as broad as the society itself.

I also agree with this statement, which is the second paragraph in the book:

> What people believe, the things that are important to them, their hopes, aspirations, and loyalties go far toward shaping the nature of their nation or region. A simple comparison serves as an illustration. Where ancestor worship is practiced, people are afraid of changing their beliefs and behavior because to do so is to threaten the security they derive from the conviction that reliable guides to living are found only in the past. On the other hand, people who believe that man has intelligence which he should use to solve his own problems regard the past as only one source of understanding and guidance, and they in no sense offer the past blind allegiance. Societies developed under these conflicting beliefs will obviously differ in numerous important respects.

Hasty amendments to the Federal Constitution have many times been proposed with sincerity to meet apparent crises in government, and frequently they have been "shortcuts" based upon misconceptions of both events and consequences. I am sure that the prevailing conception of public school officials, public officers, and many Congressmen and Senators is that the Supreme Court in the segregation cases has ordered schools for Negroes abolished and that Negro children and white children will be required to attend integrated schools in the same building. Leading newspapers and other publications speak of the impending "integration" of our school systems as if the opinion of the Court leaves no alternative other than consolidation. But the violation of the 14th amendment found by the Court in the *Oliver Brown*, 347 U.S. 483, and related cases was the compulsory attend-

ance of Negroes in separate schools solely because of race, and the mandate of the Court went no further than to order the gradual elimination of this element of compulsion by the adoption in good faith of a plan which would permit but not require Negro children to attend the same schools as white children within proper geographical districts. These conclusions will appear from a simple analysis of the language to be found in the two opinions of the Court. The real basis of the Court's opinion was the effect which the required separation of Negroes of tender age had upon such children mentally. The underlying thought implicit in the language of the two opinions is that the feeling of inferiority results not from the actual attendance in a separate school but from the legal requirement under which Negro children are compelled to attend a separate school.

It would seem logical to conclude under the opinions of the Court that Negroes attending separate schools by choice and not under compulsion would be free of the detrimental effect of segregation sanctioned and required by law. A system of separate schools available to the races upon a basis of free choice would not fall within the constitutional prohibition even in the light of its most recent interpretation by the Supreme Court.

The practical problem now existing in the South is to determine whether or not there is a feasible and constitutional plan of achieving a system of determining admission to the public schools on a nonracial basis which may be adopted in god faith and which may be accomplished with deliberate speed, but it should at all times be remembered that such a plan is not required to have as its ultimate goal the complete integration of the races in a single school system, provided the Negro's right to choose is preserved to him free from coercion.

Even Gunnar Myrdal, the Swedish sociologist whose large volume entitled "An American Dilemma" was referred to in a footnote to the recent opinion delivered by Chief Justice Warren, in discussing this matter reached the following conclusion:

> Negroes are divided, too, on the issues of segregated schools. Insofar as segregation means discrimination and is a badge of Negro inferiority, they are against it although many southern Negroes would not take an open stand that would anger southern whites. Some Negroes, however, prefer the segregated schools, even for the North, when the mixed school involves humiliation for Negro students and discrimination against Negro teachers. Other Negroes prefer the mixed schools at any cost, since for them it is a matter of principle or they believe it is a means of improving race relations.

When we are faced with a proposed amendment to the Federal Constitution that would permit the removal of all constitutional protection afforded by the 14th amendment to minority races in public education throughout the United States, it must be remembered that in the recent segregation litigation both South Carolina and Virginia affirmed and endorsed the constitutional right of Negroes to equal and adequate school facilities and relied strongly upon the original interpretation and application of the 14th amendment to State administered public schools under the previous decision in *Plessy* v. *Ferguson*. In fact, in each of the cases from South Carolina and Virginia (*Briggs* v. *Elliott, et al.*, from South Carolina, and *Davis* v. *County Board*, from Virginia) the Supreme Court found that the Negro and white schools involved had been equalized, or were being equalized, with respect to buildings, curriculums, qualifications, salaries of teachers and other tangible factors. (See 347 U.S. 483.)

Before we rush in and approve proposed constitutional amendments that wipe out the effect not only of *Brown* v. *Topeka* but also the protection afforded by *Plessy* v. *Ferguson*, we should in simple justice to the minority races recall that for years before *Brown* v. *Topeka* leaders in southern education have pointed out that our continued failure to provide equal and adequate educational opportunities for the Negro in the South, particularly at the elementary and secondary school level, was building up storm clouds of resentment that might ultimately prove disastrous to our dual system of public education. For example, Howard W. Odum, of the University of North Carolina, writing before the 1954 decision, said:

> For one, the cumulative neglect by the Southern States of Negro public schools, and the South's failure to live up to its obligations to provide equal facilities for the two races, have compounded educational deficits beyond the reasonable limits of tolerance, democratic fairplay, and moral obligations.

It seems to me that the time has come when southern leaders should disapprove frantic, futile and inept efforts either for the enforcement of or resistance to the segregation decision. Ill-advised and ill-conceived hasty efforts of military enforcement by the Federal Government at high administrative levels have already wrought havoc to the orderly administration of the public schools at Little Rock, Ark. The State of Virginia has recently had a bitter experience resulting from ineptitude and subterfuge at the State legislative level. Unless the South, through wise leadership, can work out a sound and practical plan generally acceptable to a majority of both races, such as the "choice" plan, we face a crisis not only in the field of public education but in the much larger field of general race relations. The answer does not lie in mere delay or subterfuge.

It is true that a State does have the unqualified right to withdraw from the field of public education and to discontinue its financial support of elementary and secondary schools, normal schools, and its colleges and universities. It is obvious, however, that no State can afford to take such a step without, at the same time, providing a substitute method of continuing its present school systems, and it is equally obvious that no such substitute system could function without the aid of public funds. In my opinion any so-called private school system, devised in an effort to avoid the requirements of the segregation decisions, supported by public funds in the form of grants or subsidies to the parents of schoolchildren will be just another transparent subterfuge and as such will be subjected to the requirements of the 14th amendment. Anyone holding a contrary opinion will do well to read the recent opinion of the U.S. Supreme Court in *Terry* v. *Adams*, 345 U.S. 61, in which the Court held that private Anglo-Saxon clubs in Texas, which called themselves jaybird associations, and which were organized to control the selection of nominees for county offices, violated the constitutional rights of Negroes who were excluded from membership even though these associations operated exclusively with private funds.

What is needed in the South now is a recognition of the fact that the agency set up by ourselves and our democracy to determine questions of this nature has unanimously rendered a decision which establishes with finality the illegality of compulsory segregation of the Negro in the public schools. Our problem now is to examine the scope of the

decision, to accept it, and to provide a rational plan that will come within the mandate of the Court and, if possible, one that will not destroy the public school systems.

It is to be assumed that if a gradual plan is devised in the South under which Negroes are given the right to attend mixed schools within proper geographical limitations if they choose to do so, but with the future right to elect to remain in the existing Negro schools with competent Negro teachers and equal and adequate facilities, wisdom will in most cases control the decision and a pattern will be developed for the ultimate solution of the problem without the needless destruction of existing sound values in our public educational systems.

Man cannot escape dealing with his contemporary problems. Merely to transfer the problem to the respective States and their political subdivisions, as Senate Joint Resolution 32 proposes to do, will not solve the problem of race relations, or educational problems arising from racial antipathies. The proposed constitutional amendment, in its ultimate application, in my opinion is contrary to the best interest of both the Negro and the white race, not only in the South but throughout all of the States.

The great challenge today is not how to make the world safe for a single ideology, but how to make it safe for its differences. What we need is a world that is safe for man's imperfections and his contradictions. To quote Norman Cousins in his recent book "Who Speaks for Man" (pp. 31–32):

> The challenge is to keep his [man's] differences, real and supposed, from catching fire. The issue is not whether one side can impose its will on the other, but how we can keep both sides from fusing inside an atomic incinerator.

Our best hope is the recovery of our belief in the human individual's capacity to make choices for himself in the light of the great traditional human values which in our time have become somewhat darkened and obscured. I believe the Negro is entitled to an education and I also believe it is safer to provide education for the Negro rather than to leave him in ignorance. I think that a free society should protect a minority race with constitutional rights in the field of education, and since the proposed amendment to the Constitution seeks to remove such constitutional protection under the 14th amendment, irrespective of its present or future interpretation, I feel that the proposal is unwise and, if successful, would prove detrimental to both the white and the Negro races in the field of education at the State level. I do not believe that a person, whether he be Negro or white, should be compelled to exercise a constitutional right, but I feel that he should be given a reasonable choice. It seems to me that over and above all constitutional rights is a superior right to choose for one's self as to whether the right is to be exercised. For example, the right to free speech includes the right to choose to remain silent. The constitutional privilege of assembly also includes the right not to assemble but to stay at home. To withhold an equal opportunity to gain knowledge, or to set up a State system which would permit discrimination by unequal and inadequate facilities, or to withhold knowledge on the theory of danger arising out of possible misuse, or to force integration without free choice, is to deprive a person of the only weapon adequate for the proper solution of his individual prob-

lems, and to take from him the faculties for making wise choices and value judgments in a changing world. And the fact that this may be done under the popular name of States rights does not change the final result.

I quite agree that the Supreme Court of the United States was on dangerous ground when it changed a longstanding interpretation and application of the 14th amendment because of its conception of a changed psychology. Even stanch exponents of integration, such as Prof. Herbert Wechsler who holds the professorship of Constitutional Law at Columbia University Law School, has questioned very sharply the grounds upon which the Supreme Court decided the now famous segregation cases in 1954 and 1955.

I am sure that most of us would agree that when the nine judicial priests blew on their trumpets in *Brown* v. *Topeka* the walls of racial prejudice did not "come tumbling down," as did the walls of Jericho when Joshua's seven priests blew on the ram's horn. But I am also sure that the South which found the strength and the resources to construct a new and different economy, after defeat, upon the ashes of the Civil War in time will surely find readjustment in its public educational institutions within the orbit of the *Brown* v. *Topeka* decision, even though it swept away longstanding dual systems established under the Court's philosophy and protection in its previous decision in *Plessy* v. *Ferguson*. But these readjustments must not surrender to the strident voice of the crusader, whether he be for or against the decision.

At the moment I feel that the Southern States are somewhat in the same position of the defendant in the old North Carolina Supreme Court decision in *State* v. *Linkhaw*, 69 N.C. 214. Linkhaw was a member of the Methodist Church and when the minister lined out the hymn, and the organist struck the chord, he undertook to sing the lines announced by the minister, but he sang slower than the congregation, and somewhat off key. When the congregation finished singing the line, they invariably had to wait for Linkshaw to finish the line, which he did with great persistence and nasal volume. Protests from the congregation were unavailing and finally Linkshaw was indicted for disturbing public worship. But the Supreme Court of North Carolina said that so long as he was a member in good standing, was willing to sing from the same song book and the same lines announced by the preacher, he was within his rights as a member of the congregation, even though he sang somewhat slower than the rest of the group, and was slightly off key. I think it is important that the Southern States, as well as all of the other States, should sing the words announced by the appointed authority, but I do not believe that a State should be condemned merely for singing slower than the rest of the congregation, if it is singing in good faith.

At the same time, it is my opinion that an amendment to the Constitution of the United States, such as that presently under consideration, which would authorize and permit action at the State level without any protection whatever from the 14th amendment, would be ill advised and would be rendered completely unnecessary if we in the South will but afford members of the Negro race an opportunity to make a wise choice, as distinguished from compulsory integration, with equal and adequate facilities as an alternative. This will be a

long step toward a solution of this most vexatious problem, and one which I believe consistent with the Court's opinion.

At all events, it seems to me that such a plan is much wiser than to follow the illusion of States rights against insuperable odds to the inevitable end of bitter and unrewarding defeat.

While these sentiments have been evolved from long associations and responsibilities in the fields of both white and Negro education, I am not assuming the role of either elder statesman or prophet. I assure you that I have not reached these conclusions without full consideration of Macbeth's pronouncement:

> If you can look into the seeds of time, and say which grain will grow and which will not, speak then to me, who neither beg nor fear your favors nor your hate.

Senator KEFAUVER. Thank you very much, Mr. Sims, for your statement. It is quite apparent you have given this matter a great deal of consideration, and that you have gone to a lot of trouble to prepare this statement for the committee, which we appreciate.

Senator Javits raised the question here as to whether the technical wording of this amendment really did anything. In other words, he says that administrative control of the schools is still with the local communities and the Supreme Court has not disturbed that. He says that the Supreme Court decision deals only with the right of the individual.

Upon reading the amendment, Mr. Sims, do you agree?

Mr. SIMS. The Senator evidently is referring to lines 9 and 10 on the front page, and lines 1 and 2 on the back page, and to that extent I do agree with him. But the Senator, I feel, did not give sufficient effect to the last three or four sentences which provide—

> nothing contained in this Constitution shall be construed to deny to the residents thereof the right to determine for themselves the manner in which any such school, institution or system, is administered by such State and subdivision.

Now, it is true that the first part of the proposed amendment does state that administrative control of the public schools shall be vested exclusively in the State. That is true now. The administrative control of the public schools is vested in the State and the cities and counties, and that is the mere statement at the beginning of the amendment which I believe is already the law.

But it goes further than Senator Javits pointed out. And after making that statement it withdraws from that administrative control any inhibitions that might be imposed upon it by other language or provisions of the Federal Constitution.

So, it is the latter part that is the part that has the changing effect by removing the 14th amendment, for example, and the requirements of the 14th amendment, as restrictive action upon the State administration of schools which is now vested in them and will, after the amendment, be vested in them.

Senator KEFAUVER. Then you do not think the use of the word "administrative" in line 6 of page 2 refers back to administrative control in line 9 on page 1, and means the same thing?

Mr. SIMS. I think you could have gotten better words than "administrative control" but looking at the full intent of it as the Court would do, I think it meant the choice of methods of either maintain-

ing or not maintaining separate school systems or no schools—would be a pure matter for the States and that no Federal court would have a right to interfere with it because of a violation of the 14th amendment. That is what the amendment is designed to accomplish. I think it could be construed to accomplish that if it is passed.

Senator KEFAUVER. He made the point that in any event the Court would lean over backward to try to construe the amendment in line with the expressed intention of the sponsor.

Mr. SIMS. That's right.

Senator KEFAUVER. You have already stated your view, but is there any question in your mind as to how far back in time this amendment would take us?

Mr. SIMS. No question whatever in my mind. Of course, it goes back prior to the adoption of the 14th amendment because it removes the 14th amendment from its inhibiting effect upon the contrary administration of State schools.

Senator KEFAUVER. You think it does so not only as to matters of race or national origin, but religion also?

Mr. SIMS. Yes, I do. I think there are a lot of people who have a stake in this situation other than the Negroes, the Negro race. For example, Catholic schools. We have some very fine Catholic schools in Tennessee and elsewhere, and assuming that a State was of a mind to do it, and amended its constitution, under this amendment, it can have wide reaching effects so as to interfere with minority groups in the field of religion as well as in the field of race.

I think it is unwise.

Senator KEFAUVER. Please explain that. I think that what you mean ought to be made clear in the record.

Mr. SIMS. You have to judge the wisdom of an amendment by assuming its abuse at the time.

Of course, we wouldn't need any Constitution at all, either Federal or State, if everybody did what they should do.

If this amendment should pass, and a State anywhere, South or North, decided that they were going to prohibit members of a certain religion from attending schools, they could prescribe a religious test. I think that would be wrong.

I doubt if any State would do it, but the way you determine the wisdom of legislation is not the wise measures which are adopted, but whether unwise measures could legally be adopted, because what you want in a Constitution is protection against unwise action and improvident action at State level or any other level.

You take, for example, and I am just thinking as you asked me the question, the Christian Science religion. You have the problem at the State level of whether or not they have a right to be protected against inoculations as a medical requirement for attendance in public schools, and those problems have been pretty well settled.

This opens up all of that again.

Or teaching the Bible in public schools.

I have heard some reference here this morning about some decisions on that. I believe the case was actually cited.

Senator KEFAUVER. The case of *McCollum* v. *Board of Education*, 332 U.S. 203.

Mr. SIMS. We have a law in Tennessee which permits the teacher to read one verse out of the Bible without comment or construction as she interprets that verse, but prohibits reading the same verse more than once, and that has been approved, but we have lots of people who would like to, at the State level, impose their ideas of religion and as a test for admission to the public school system. And that would open that. I think it is an unwise step.

I am for States rights, Senator; you know that about as well as anybody; but I think it is an unwise step.

Senator KEFAUVER. You feel under this proposed amendment, Mr. Sims, that, if a State wanted to, it could prohibit Protestants, or Catholics or Jews from attending a public school?

Mr. SIMS. It could require a means test, a financial means test; it could require that you own property as a condition of admission. It is a Pandora's box. It is hard enough to get along in public schools now with all of the problems that we have, juvenile delinquency and things of that sort. It is getting pretty hard for a man just to live and participate in public life at any level.

Perhaps the Senator has found that to be true more than I have.

Senator KEFAUVER. Now, let me ask your interpretation of this: On page 2 of this resolution:

> Nothing contained in this Constitution shall be construed to deny to the residents thereof the right to determine for themselves the manner in which their schools, institutions or systems are administered by such State or subdivision.

Do you understand from that that people in the States have the right to decide upon these matters or that subdivisions of State have the right? In other words, if this amendment were passed, suppose the subdivision of the State had decided one way——

Mr. SIMS. You would have local option, if that is what you mean, yes. The word "residents"—of course, residents do not run the school systems under the machinery that we have now. The residents elect members of the school board or they elect some other body that elects members of the school board.

But strictly construed the word "residents" in this resolution would mean by the expression of public sentiment of the residents which would mean only local option by voting for or against.

I think it is an unfortunate choice of words. I do not think it was intended to mean local option, but it could be construed to mean that.

If it does, then you could have a spotted school system, even under State laws where there would be compulsory integration in one place and compulsory segregation in another case is an adjoining county, or even in the same county if there are two school systems.

Senator KEFAUVER. You mean each school district?

Mr. SIMS. It could determine for itself by its own residents, yes.

I know that this was not the intent and purpose, but this would permit the public to vote for compulsory integration even though the legislature had a different view of it.

Senator KEFAUVER. You mean the legislature of a State might decide one way, and the school district could decide another?

Mr. SIMS. It could say that we are going to integrate and we are going to force the Negroes and the whites to go to school together. I think that it is rather farfetched to think that they would do that, but I think it is possible.

It says residents, and that means residents of any State, city, county, or other subdivision which would mean a school district.

Senator KEFAUVER. Under this, Mr. Sims, do you think that—I know this was not intended, but I think that we should look at all the possibilities—it would be possible in a State or district to turn the public schools over to parochial or religious schools?

Mr. SIMS. If you did not violate the State constitution.

Senator KEFAUVER. It would be alright as far as the Federal Constitution is concerned?

Mr. SIMS. It would be legally possible to do it if it did not violate the State constitution.

Senator KEFAUVER. I intended to ask Senator Javits questions about this, but I did not get around to it.

He says on page 2 of his statement that, if a school principal embezzles school funds from the national bank or a teacher sells narcotics within the school, or the school board decides to teach and advocate overthrow of the United States in the classrooms, that these things would not be prohibited by the Federal Constitution.

Mr. SIMS. Well, I have not given it any consideration, but it occurs to me offhand that he is not quite right about that. If a school teacher embezzles Federal funds from a bank—I suppose he is talking about Federal subsidies for hot lunches or something of that sort, under the Commodities Act—I think that would still be a crime whether this amendment were passed or not. That is my offhand opinion. I think he went too far when he said that from the standpoint of that particular situation.

Senator KEFAUVER. Anything else, Mr. Sims?

Mr. SIMS. I have nothing further.

Senator KEFAUVER. Mr. Fensterwald?

Mr. FENSTERWALD. I would like to ask one question.

Senator Robertson stated this morning that he thought Alaska and Hawaii, which were admitted recently, had more control over their school systems than the State of Virginia. Do you feel that is true with respect to Tennessee?

Mr. SIMS. I think he was not well advised in making that statement. I have not investigated that situation but before Alaska came in as a State it was Federal Territory, was it not? Those schools had been built by Federal funds or Federal trust funds and I think that the language was merely to guarantee that after Alaska became a State they would be State schools and State-owned and would not remain Federal institutions. That was my interpretation from reading the newspaper.

Oklahoma, for example, I suppose had schools when it was Oklahoma Territory, and there had to be some way of defining ownership by the State of what had prior to that time been Federal property. I would assume that that was the purpose of it.

I do not think that since the *Tidelands* case anyone can say that a special reservation contrary to the uniform application of the Constitution to other States could be made at the time the States was taken in, that would give them unique rights over and above the Constitution that other States did not have.

I don't think that is correct.

Senator KEFAUVER. You believe that once they come in as a State they come in on equal footing.

Mr. SIMS. That is what the Supreme Court said in the *Tidelands* case.

Mr. FENSTERWALD. That is the only question I had.

Senator KEFAUVER. We thank you very much.

Mr. FENSTERWALD. Mr. Chairman, we have one further witness, Mrs. M. D. Leetch, who is executive secretary of the American Coalition of Patriotic Societies.

Senator KEFAUVER. Let us take a short recess.

(A short recess was taken.)

Senator KEFAUVER. Our next witness is Mrs. M. D. Leetch, executive secretary of the American Coalition of Patriotic Societies. We are glad to have you with us, Mrs. Leetch. Senator Talmadge suggested that you be invited to testify, and we are glad to have you.

Where do you live, Mrs. Leetch?

Mrs. LEETCH. I am a resident of the District of Columbia.

Mr. FENSTERWALD. Mrs. Leetch, before you begin, could you tell us a little bit about the American Coalition?

Mrs. LEETCH. I will be very glad to. I have just given you a list of our organizations for the record.

Mr. FENSTERWALD. I think it would be well to include it in the record.

(The list of cooperating societies is as follows:)

SOCIETIES COOPERATING WITH THE AMERICAN COALITION OF PATRIOTIC SOCIETIES, WASHINGTON, D.C.

Alliance, Inc., The
American Coalition of New York
American Institute, The
American Public Relations Forum, Inc.
Americans, Inc., The
American War Mothers
American Women's Legion of World Wars
Americanism Defense League
Associated Farmers of California, Inc.
Associated Farmers of Richland Co., Inc. (Ohio)
Better Government Forum
Christian Women United
Connecticut Volunteers
Dames of the Loyal Legion of the United States
Dames of the Loyal Legion of the United States, District of Columbia
Dames of the Loyal Legion of the United States, Pennsylvania
Daughters of America, National Council, Clara Barton Co. No. 71
Daughters of America, National Council, Pride of Baltimore County No. 14
Daughters of America, District of Columbia Council
Daughters of America, New Jersey Council
Daughters of the Revolution, National Society
Daughters of the Revolution, New Jersey Society
Daughters of the Revolution, New York Society
Daughters of the Revolution, Commonwealth of Pennsylvania
Daughters of the Revolution, Colonial Chapter
Daughters of the Revolution, Ex-Officers Club
Daughters of the Revolution, Lafayette Chapter
Daughters of the Revolution, Liberty Bell Chapter
Defenders of the American Constitution, Inc.
Defenders of State Sovereignty and Individual Liberty, Arlington Chapter
Descendants of the Signers of the Declaration of Independence
Fraternal Patriotic Americans, State of Pennsylvania, Inc.
General Society of the War of 1812
General Society of the War of 1812, District of Columbia Division
General Society of the War of 1812, New York Division

Grass Roots League, Inc.
Junior Order United American Mechanics, New Jersey
Junior Order United American Mechanics, New York, Inc.
Junior Order United American Mechanics, Pennsylvania
Ladies of the Grand Army of the Republic
Ladies of the Grand Army of the Republic, Department of the Potomac
Marine Corps League Auxiliary, Inc.
Massachusetts Committees of Correspondence
Michigan Coalition of Constitutionalists
Military Order of the Loyal Legion of the United States, Commandery in Chief
Military Order of the Loyal Legion of the United States, Commandery of the District of Columbia
Military Order of the Loyal Legion of the United States, Commandery of the State of New York
Military Order of the Loyal Legion of the United States, Commandery of the State of Pennsylvania
Military Order of the World Wars
Minnesota Coalition of Patriotic Societies, Inc.
National Huguenot Society, The
National Service Star Legion, Inc.
National Society, Colonial Dames of the XVII Century, New York State Society
National Society, Congress of States Societies
National Society for Constitutional Security
National Society for Constitutional Security, Chapter I
National Society for Constitutional Security, Chapter II
National Society for Constitutional Security, Chapter III
National Society, Daughters of the Union, 1861–65
National Society, Magna Carta Dames
National Society of New England Women
National Society of New England Women, New York City Colony
National Society, Patriotic Women of America, Inc.
National Society, Patriotic Women of America, District of Columbia Council
National Society, Patriotic Women of America, New York Council
National Society, Sons and Daughters of the Pilgrims
National Society, U.S. Daughters of 1812, State of New York
National Society, Women Descendants of the Ancient and Honorable Artillery Company
National Sojourners, Inc.
National Woman's Relief Corps
National Women's Relief Corps, Department of Potomac
Naval and Military Order of the Spanish-American War, National Commandery
Network, The
New Jersey Coalition, Inc.
Ohio Coalition of Patriotic Societies
Order of Fraternal Americans, Grand Council
Order of Independent Americans, Inc., State Council of Pennsylvania
Order of the Founders and Patriots of America, California
Order of the Founders and Patriots of America, District of Columbia
Order of the Founders and Patriots of America, Massachusetts
Order of the Founders and Patriots of America, New Jersey
Order of the Founders and Patriots of America, New York
Order of the Founders and Patriots of America, Rhode Island
Order of the Three Crusades 1096–1192, Inc. (The)
Order of Washington
Patriotic Order Sons of America, National Camp
Patriotic Order Sons of America, State Camp of Pennsylvania
Rhode Island Association of Patriots
Society of Old Plymouth Colony Descendants
Sons and Daughters of Liberty, National Council
Sons and Daughters of Liberty, State Council Connecticut
Sons and Daughters of Liberty, State Council District of Columbia
Sons and Daughters of Liberty, State Council Maryland
Sons and Daughters of Liberty, State Council Massachusetts
Sons and Daughters of Liberty, State Council New Hampshire
Sons and Daughters of Liberty, State Council Pennsylvania
Sons and Daughters of Liberty, State Council Virginia

Sons of the American Revolution, National Society
Sons of the American Revolution, California Society
Sons of the American Revolution, Empire State Society
Sons of the American Revolution, Iowa Society
Sons of the American Revolution, New Jersey Society
Sons of Union Veterans of the Civil War Commandery in Chief
Sons of Union Veterans of the Civil War, Massachusetts Department
Sovereignty Preservation Council of Delaware
Taxpayers, Inc.
United States Day Committee, Inc.
United States Flag Committee
Wheel of Progress, The
William Thaw Council of Americans, Inc.
Women of Army and Navy Legion of Valor, U.S.A.
Women's National Defense Committee of Philadelphia
As of March 1959.

Mr. FENSTERWALD. I wonder, Mrs. Leetch, if you are speaking in behalf of this whole long list? I believe there are 112 organizations listed.

Mrs. LEETCH. The organizations are represented by their own sentiments in the constitution of the American Coalition of Patriotic Societies, which is in defense of the Constitution, and the three branches of our Government, as I stated in my prepared statement. My remarks are always my own.

Mr. FENSTERWALD. Could you tell us just a word? There are so many of these organizations, some of which are very well known and some not so well known.

For example——

Mrs. LEETCH. Civil, fraternal and patriotic men's and women's organizations who have their own autonomy, adopt their own resolutions, and attend to their own business, and they are merely called cooperating societies of the American Coalition.

Senator KEFAUVER. The American Coalition?

Mrs. LEETCH. Cooperating. It is not a membership organization. They are just cooperating societies whose thinking is along very patriotic lines and who subscribe to the Constitution of the American Coalition which I have with me, if you would like to have it.

Senator KEFAUVER. That is all right; you file it, please.

Will you proceed, Mrs. Leetch?

STATEMENT OF MRS. M. D. LEETCH, EXECUTIVE SECRETARY, AMERICAN COALITION OF PATRIOTIC SOCIETIES

Mrs. LEETCH. I am executive secretary of the American Coalition of Patriotic Societies. This is a statement of a layman on the thinking of many concerned Americans. My remarks are my own.

The American Coalition was organized to help maintain and defend the Constitution of the United States and the integrity and functions of the three branches of Government under it.

Now, we know, and it has been testified to in many hundreds of pages of official documents, that the greatest protection against the final takeover from within by the common enemy, international communism, is the States rights structure under the Constitution of the United States.

The Negro people, by and large, are innocent tools in the divisionary Communist-aiding turmoil over integration versus segregation as

some of the most sensible and level-headed of that race have, with understanding, pointed out. He stands to lose his priceless freedom along with all Americans, if the strong States rights structure of our Constitution is successfully broken down and that bulwark against centralization swept away. Agitators have no love for the so-called underprivileged (all of whom are more privileged in this country than in any other), but use them as a means to an end, the end being loss of freedom for all Americans.

A great deal has been written about the author of "An American Dilemma," used in footnote 11 by the Supreme Court as a basis for its 1954 decision. Gunnar Myrdal, the Swedish Socialist, has no use for the Constitution of the United States. If his allegations against it were correct, the American people could properly change it through their legislatures if they so desired.

Instead, apparently for political reasons, this social problem has been injected into the field of law where it does not belong.

It seems to many average patriotic American citizens that the doctrine established by the Supreme Court that the Constitution changes without any new legislation because of psychological and sociological theories and preferences for those theories by current Justices of the Court, is a dangerous one. We believe it is an infringement of the legal rights of the sovereign people to be governed by law; we believe we should stay within the framework of the law.

It is perhaps elementary to repeat that we have a Constitution of delegated authority from the sovereign source. The legal right of the people at the local level is not only inherent in the structure of the Constitution, but it is spelled out as well. By giving up the judicial determinations that have been the cornerstone of the American system, the legal protection of every citizen is surrendered.

Thus the Supreme Court itself has lessened faith and confidence in it as an institution to safeguard constitutional rights and has brought careful legal analysis of its decisions in this and numerous other cases declared to be against the national interest. It follows that the sovereign people are demanding remedies for the serious situation that confronts them as a result. Senate Joint Resolution 32 is only one of these. A school of legal thought prefers amending or adding to title 28 of the United States Code as provided in S. 1593 also introduced by Senator Talmadge. Remedies for other decisions of the Supreme Court are before the Senate Subcommittee on Internal Security in response to popular demand.

Overburdened American taxpayers, struggling under the load of an enormous military assessment for national defense and additional billions for foreign aid for the avowed purpose of lghting communism in this and 70 other countries, are alarmed at the course we are taking at home which plays into the hands of the common enemy. We are traveling a one-way street of American socialism, fruit of the same tree as communism with ever-increasing direction and control from Washington and from the United Nations which will inevitably bring about the extinction of this Republic.

We support the principle of decentralization for survival. We support whatever remedial measures will accomplish restoration of constitutional government. Efforts like Senate Joint Resolution 32, if adopted, probably should be amended to become a redefinition of exist-

ing constitutional provisions with the further proviso that the amendment shall not be interpreted as weakening any other powers reserved to the States and to the people under the 10th amendment of the Constitution.

The threat is mastery over all of our minds and over all of our lives. The fate of all of us and our country, is largely in your hands. Only through restoration of constitutional government can we hope to escape the tragic fate of all republics.

Constitutionally, legally, the sovereign people already have jurisdiction over their schools. Whether there is any advantage in making it crystal clear by constitutional amendment so that no court can misinterpret, is something for legal minds to determine.

We commend the effort to bring this vital situation and the problem that faces us to public attention and especially commend the move because it gives decentralists the initiative. We have been too long on the defensive. Patriotic Americans want to do something to salvage what is left of constitutional government and ask your wisdom and statesmanship in the attempt.

Senator KEFAUVER. Thank you very much, Mrs. Leetch.

Mrs. LEETCH. Without getting into a debate which I am not equipped to do——

Senator KEFAUVER. You are not a lawyer?

Mrs. LEETCH. I am not.

The 14th amendment, however, by any amateur's research at the time certainly covered only adult rights, did it not? And it did contemplate that it covered children in school, and I think to back that statement up would be to call attention to the irrefutable fact that many States, as many as 35, were concurrently establishing by separate but equal education in their respective school systems at the time of the adoption of the 14th amendment.

Which was a much later decision, am I correct, much later decision which provided education to the 14th amendment.

Senator KEFAUVER. The 14th amendment to the Constitution, all of the Constitution, applies to every person in the United States, child or adult. The courts have held that the protection of the Constitution applies to aliens within the United States.

Mrs. LEETCH. I know that. It is a very debatable amendment and greatly debated but it was not drawn to affect children in school and the interpretation that it affected education came many years later at the turn of the century.

I do not know that it makes a great deal of difference, but the point is that the makers had it apply, intended it to apply to the adult rights, voting rights, political rights, property rights, that sort of thing.

Senator KEFAUVER. It is organically a part of the Constitution. The whole Constitution applies to everybody.

Mrs. LEETCH. This is to assure the committee that the concern is not only in the South but it is everywhere. It is not just in the South. And our concern also is for some of these advantages for our own white race would like to have children have some place to go. If there is a choice of rights for Negro children which could be argued as proper, there should also be a choice of rights for white children.

Let us not abdicate their rights in our scramble to give the Negroes their rights.

Senator KEFAUVER. Any questions, Mr. Fensterwald?

Mr. FENSTERWALD. I would like to ask one very brief question:

Are your cooperating societies all American societies?

Mrs. LEETCH. Oh, yes.

Mr. FENSTERWALD. Some of the names of them are rather unusual, such as the Order of the Three Crusades, and the National Society, Magna Carta Dames.

Mrs. LEETCH. These are heriditary societies of the women descendants of the men who were taking part.

Mr. FENSTERWALD. In the three crusades?

Mrs. LEETCH. Yes.

Mr. FENSTERWALD. How about the Network?

Mrs. LEETCH. The Network; that is not a heriditary society, that is an organization with headquarters in California. It is an extremely patriotic group, a study group of individuals in and around Pasadena.

Mrs. FENSTERWALD. How about the Magna Charta Dames?

Mrs. LEETCH. Hereditary. The barons of Runnemede—John's barons.

Senator KEFAUVER. Thank you very much, Mrs. Leetch.

We will meet again at 10 o'clock in the morning. We stand in recess until 10 o'clock in the morning.

(Whereupon, at 12:35 p.m. the hearing was recessed until 10 a.m. Friday, May 15, 1959.)

CONSTITUTIONAL AMENDMENT RESERVING STATE CONTROL OVER PUBLIC SCHOOLS

FRIDAY, MAY 15, 1959

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:10 a.m., in room 2228, New Senate Office Building, Hon. Estes Kefauver (chairman of the subcommittee) presiding.

Present: Senator Kefauver (presiding).

Also present: Bernard Fensterwald, counsel; Miss Kathryn Coulter, clerk.

Senator KEFAUVER. The committee will come to order.

Our first witness this morning is Mr. Albert F. Metz.

Mr. Metz is president of the American Taxpayers Association. Mr. Metz, will you tell us your residence.

STATEMENT OF ALBERT F. METZ, PRESIDENT, AMERICAN TAXPAYERS ASSOCIATION

Mr. METZ. My residence is Rutherford, N.J.

Senator KEFAUVER. Do you want to tell us what the American Taxpayers Association is?

Mr. METZ. It is a rather old association interested largely in the Federal tax policies and in those things which affect Federal tax policies. We think this is one of those issues which does affect our tax policy and, of course, reaches pretty far because it is a constitutional question itself.

Senator KEFAUVER. Do you have members in various parts of the United States?

Mr. METZ. Members in various parts of the country.

Senator KEFAUVER. All right, sir. We will be glad to have your statement.

Mr. METZ. I am Albert F. Metz, president of the American Taxpayers Association and appreciate very much this opportunity to comment on Senate Joint Resolution 32.

I believe that Senator Talmadge's introduction to this proposal will go down in history as one of the famous documents of this great body. I hope my remarks may add support to his statement.

Our Nation has been known throughout its history as a melting pot for the end product of a citizen-alloy purged of the dross of group differences and dedicated to the utmost freedom in the pursuit of happiness.

The catalyst or flux in the production of this citizen-alloy is our Constitution to which we all swear our support.

One does not responsibly approach the consideration of an amendment to our Federal Constitution without thoughtfully reviewing the obvious intent of this great document—and further, because of its sufficiency, any amendment would only seem mandatory when poor understanding of its intent results in devious or mischievous misinterpretation of its very obvious purposes.

Our Constitution is recognized universally as the greatest instrument of man for a government of free and independent citizens.

It has the eternal essence of the Golden Rule and the Ten Commandments but like them, requires the self-discipline of both the individual citizen and our public servants.

Generally speaking, I would defend the following as the major premises of the several original States in forming the Constitution which are widely recognized by informed students of constitutional government:

(1) The individual States were and can be sufficient unto themselves—

(*a*) except for the hazard of foreign aggression,

(*b*) except for the peaceful development of constructive and prosperous interstate and international relations, and

(*c*) except for major catastrophes and other such matters requiring joint State action.

They set about writing a Constitution to restrict Federal Government to just those responsibilities. There certainly was not intended any forced Federal conformity in other areas of government.

(2) The States were to be the final arbiters of the powers specifically assigned to the Federal Government. This was not intended as a function of any court.

(3) The States were to retain all other government responsibilities. As a matter of fact, the preponderance of evidence definitely indicates that the States were quite determined that they maintain complete sovereignty to the greatest extent possible.

(4) The Senate was conceived as a body to particularly represent State government and it would seem by inference a guardian of State sovereignty.

(5) The requirements for so-called checks and balances were meticulously thought out to prevent the exercise of centralized power and government by mob hysteria.

One hundred and twenty years of respect for these concepts produced an independent, energetic, progressive, and enterprising federation of States which set a pattern for self-government. We had survived a foreign invasion, crushing depressions, a bloody Civil War, a foreign war to prevent European tyranny in the Western Hemisphere and at the same time we expanded the territory and prosperity of our people to envious proportions. Our debt was nominal and our budgets were balanced—all of this while we had an ingrained understanding of our heritage.

It is regrettable that from about 1910 we seem to have gradually lost this understanding of the bare rudiments and disciplines of our constitutional form of government. Both the 16th and 17th amendments were emotionally and thoughtlessly ratified although they

are in complete discord with the tenets expressed and implied in our proven constitutional philosophy.

Senator KEFAUVER. What is the particular significance of the date 1910?

Mr. METZ. That is about the time that the 16th amendment was conceived.

And I think it was the one great departure from our traditional thinking of constitutional government.

Senator KEFAUVER. The 16th amendment was adopted in 1913 or 1914.

Mr. METZ. Yes.

Senator KEFAUVER. All right, sir, proceed.

Mr. METZ. The 16th amendment destroys the concept of taxation by enumeration which recognizes the responsibility of each and every citizen. In its place it has substituted the very type of taxation which caused the Revolutionary War and which certainly should have had some constitutional limits to this Pandora's box. The 16th amendment is practically an exact reproduction of the most destructive plank in the Marx Communist manifesto.

The 17th amendment peculiarly sacrificed a most important check on unconstitutional infringement by the Federal Government. It provided no watch dog to supplant this necessary function for the benefit of the States. In the face of all history and reason, the 17th amendment acceded to the gradual domination of what Mr. Jefferson so aptly described as mob rule which is a sort of fanatic worship of the concept that a 51 percent majority should have the power to confiscate the substance of the remaining 49 percent. The State Governors and legislatures are certainly in the best position to select Senators with a dedication to State prerogatives.

The 18th amendment attempted to interfere with morals, ethics and private personal preference which never have and never will be governed by legislation. No police force could possibly be made available to administer such legislation. It made us a nation of lawbreakers and had to be revoked.

Our Supreme Court, unfortunately subject to the good and bad features of political patronage, has been properly and critically censured by the greatest legal organizations in the country. The positions traditionally rated as the greatest rewards for highly reputed career jurists have not maintained the regard which has been inherent in those offices. As one consequence, we now have so much conflicting Supreme Court interpretation of Interstate Commerce that no self-respecting attorney will hazard an opinion on the subject. This, in spite of the fact that the intent of the Constitution is most direct and simple in this respect. As another consequence of this conflict of interpretation we have seen such presumption of our highest Court of legislative and administrative authority as to nullify the Constitutional process in such areas as sedition, State law, treason, farm subsidy, taxation, labor and education. We have been saddled with law which has not been arrived at by procedures provided in the Constitution.

Therefore, largely because of our deliberate although perhaps unknowing departure from our traditional Constitutional purpose since about 1910, we have accepted the prime tenet of communism in our

tax policy. We have lost our identity in the frustrating and extravagant settlement of two world wars and one devastating police action. We have opened the doors to extreme pressures of inflation through tax monetary and debt policies. We subsidize special groups. We subject social security to increasing instability every election year. We permit rackets to control a large portion of our citizens. Budget balancing is becoming a lost art in the face of confiscating huge taxes.

A large share of the cause of this undesirable trend can be placed in the absorption by the Federal Government of State and local functions far beyond human possibility to cope with in addition to its constitutional functions.

I briefly commented on our great melting pot. One of the problems that has developed in this area is not of a character that can be settled by legislation or law. In essence it is social and must be settled voluntarily through social processes which really are the melting pot. Whereas 40 to 50 years ago we were well on the way toward a general acceptance of voluntary procedures by which racial differences and aims were being gradually solved, there has developed in the meantime an urge on the part of some to exploit these differences and create sores and situations that never previously existed. We now have a long, difficult assignment to develop racial harmony and the prevention of the inclination to riotous conditions on the one hand and on the other having an overpowering Federal Government impose a procedure which will never be properly accepted at the point of bayonets.

The history of the last few years should wake us up to the realization that social progress can only come through voluntary means. I am sure that the more intelligent members of all races have come to this conclusion.

The one specific area in which a voluntary effort can thrive is that of education. Since we cannot afford violence in the development of public education, it is necessary that education be controlled as far as possible in the local area with the necessary State requirements for a rounded education. We certainly cannot afford the closing of schools—the baiting of hasty tempers—the tyrannical use of high Government pressures, if we are to have a good example in that part of our education which requires the greatest amount of sanity and the greatest amount of patience and understanding. This will not come from the top down and must be generated and nurtured at the grass roots.

I have unbounded faith in the people of every State to solve their own social problems in their own way.

There is nothing but slavish conformity in the idea of Federal control of education. It has proven a setback to the proper improvement of local educational requirements and responsibility. It cannot produce a solution for morals and ethics by law. Competition for higher educational standards is inherently more constructive and far more broadening; in 50 independent State systems than in any dictatorial single bureaucracy.

I urge the passage of Senate Joint Resolution 32 as a reaffirmation of the written Constitution and its farsighted intent thereby reserving the responsibilities of public education to the States where they be-

long. It is fitting that the Senate sponsor such action since I believe it is the duty of this Chamber to preserve the Constitutional intent of State sovereignty.

At least the several States are entitled to vote on this very important matter.

Thank you, Mr. Chairman.

Senator KEFAUVER. Thank you very much, Mr. Metz. I do not know if you are a lawyer or not.

Mr. METZ. No, I am not a lawyer.

Senator KEFAUVER. Then you have presented the matter on a broad basis.

Mr. METZ. I think that is about the only capacity I have, to present it that way, yes.

Senator KEFAUVER. And I do not suppose you want to discuss the details or the legal aspects.

Mr. METZ. I have not prepared any documentation, but I would be glad to if you would like me to.

Senator KEFAUVER. That is all right; we have your statement.

Any questions?

Mr. FENSTERWALD. Just one question, Mr. Chairman.

I noted that Mr. Metz' statement indicated that he was, and I think his organization was, opposed to the 16th, 17th, and 18th amendments. I wondered if they were equally opposed to the 19th, 20th, and 22d, which have also been passed since 1910.

Mr. METZ. There has been nothing in those three amendments of the nature that I speak of, viz. a change in the Constitutional concept.

Senator KEFAUVER. They do not deal with matters on taxation.

Mr. METZ. No. One is as to the matter of suffrage and the other is to the term of the President, isn't it, the inauguration date and the term of the President. I do not think those have any bearing on the subject matters.

Senator KEFAUVER. The two-term limitation.

Mr. FENSTERWALD. The reason I asked, Mr. Chairman, is I could not see any direct connection—although there may be an indirect connection—between the 17th and 18th amendments and the subject of taxation.

Mr. METZ. We think it is a trend to have more and more centralization of government in Washington. And it is costing the taxpayers too much money.

Mr. FENSTERWALD. I see. Thank you very much.

Senator KEFAUVER. We thank you very much, Mr. Metz, for coming and being with us.

Mr. METZ. Thank you for the opportunity, Senator.

Mr. FENSTERWALD. Our next witness, Mr. Chairman, is Brig. Gen. Merritt B. Curtis, U.S. Marine Corps, retired.

Senator KEFAUVER. I see that General Curtis is secretary and general counsel of the Defenders of the American Constitution, 1255 New Hampshire Avenue, NW., Washington, D.C.

We are glad to have you with us, General Curtis.

43321—59——13

STATEMENT OF BRIG. GEN. MERRITT B. CURTIS, U.S. MARINE CORPS, RETIRED, SECRETARY AND GENERAL COUNSEL OF THE DEFENDERS OF THE AMERICAN CONSTITUTION, WASHINGTON, D.C.

Senator KEFAUVER. Are you a resident of Washington, D.C.?

Mr. CURTIS. Yes, sir, I am.

Senator KEFAUVER. I mean, this is your native home?

Mr. CURTIS. No; I am a native of California.

Senator KEFAUVER. Of California. I see.

Do you want to give us a word about the organization and membership of the Defenders of the American Constitution before you start?

Mr. CURTIS. The Defenders were organized some years ago at the time that the Status of Forces Treaty went into effect, and Private Keefe and some other men were turned over to the French authorities, and later for imprisonment under that treaty. We were organized to pursue the *Keefe* case to its final fulfillment; we carried the case through the district court, the court of appeals and up to the Supreme Court; we hoped but were not successful, of course, with the Status of Forces Treaty still in effect.

The president of the Defenders is Lt. Gen. Pedro A. Delvalle, U.S. Marine Corps, retired, and Col. Eugene C. Pomeroy is the treasurer. Mr. David Horton, who is sitting back here now, is the chairman of our executive counsel.

Senator KEFAUVER. We are glad to have you with us, sir.

Mr. CURTIS. We have considerable membership; I really do not know just how much it is. We do not have an accurate count of membership.

Our organization is maintained by contributions and sales of our magazines which we publish.

Senator KEFAUVER. What is the name of the magazine?

Mr. CURTIS. It is called Task Force.

Senator KEFAUVER. All right, sir. We are glad to have you here. You have a statement?

Mr. CURTIS. Yes, sir.

Mr. Chairman, I appreciate the opportunity of appearing here on behalf of the Defenders of the American Constitution, Inc., in opposition to Senate Joint Resolution 32. Let me make it clear at the outset, however, that it is not the spirit or intent behind this proposed constitutional amendment to which we take exception. Insofar as this proposal is one designed to oppose and control the arrogations of legislative authority by the U.S. Supreme Court, we associate ourselves with that principle. This proposed amendment, however, is not an effective check on the pretensions of the Court. Our reasons for this position I will develop shortly.

Mr. Chairman, the problem that faces all defenders of the United States Constitution today is not altogether a new one. In 1787 and in the years preceding, we had a bitter controversy between the advocates of irresponsible, unlimited powers of government on the one hand, and, on the other, those like Jefferson, who knew it was better to restrain public servants with the chains of a constitution. Today, many think that these protective chains have weakened and, in some instances, have disappeared entirely.

Today there is an alarming number of well-placed individuals who advocate and support the irresponsible and unrestrained exercise of usurped legislative power by a group of men who hold office under a life tenure and are in no degree accountable to the people. The Defenders of the American Constitution look upon supporters of this view as constitutional apostates. The high positions held by some who advocate this policy, we believe to be good reason for increased alarm—an alarm occasioned by the ignorance of constitutional principles in some quarters and, in others, possible deliberate and dangerous philosophies.

Throughout the political history of our Nation, the Absolutists have long struggled to undermine the Constitution. In 1833, for example, the members of the New York State Legislature felt obliged to take a strong stand on this. They declared themselves to be unqualifiedly against—

> the dangerous heresy that the Constitution is to be interpreted, not by the well understood intentions of those who framed and of those who adopted it, but by what can be made out of its words by ingenious interpretation.

Senator KEFAUVER. General Curtis, do you mind interruptions as you go along?

Mr. CURTIS. No, indeed.

Senator KEFAUVER To what act of the New York State Legislature are you referring? I remember something about it, but I have forgotten.

Mr. CURTIS. I have forgotten the exact—. It is in this autobiography of Martin Van Buren, and he relates the circumstances. I have forgotten just what occasioned the stand.

Senator KEFAUVER. That is all right. You proceed, please.

Mr. CURTIS. Annual Report, 1918, American Historical Association, volume II, "Autobiography of Martin Van Buren."

More recently, on September 9, 1958, the Virginia Commission on Constitutional Government, appointed by the General Assembly, that Commonwealth stated:

> * * * we hold that in attempting to prohibit to the States the power to operate separate schools, the Court usurped the amendatory power that constitutionally is vested in three-fourths of the States alone. In effect, the Court sought not merely to interpret the Constitution, but substantively to amend the Constitution, and this the Court had no authority to do.

That view is in accord with the dictum of the late Chief Justice Hughes:

> It is not for the Supreme Court to amend the Constitution by judicial decree.

The position of the Defenders of the American Constitution is in full agreement with the foregoing statement of the Virginia Commission on Constitutional Government. The immediate problem, as we see it, is how to deal with bold and, thus far unchallenged, usurpation. We do not believe that Senate Joint Resolution 32 is the proper remedy to deal with it. First of all, it sets forth in the Constitution a controversial matter that has never heretofore been the subject of constitutional definition. We believe that it is pernicious for that reason and that it would be a great mistake to proceed with it, for it would occasion much unnecessary controversy and bitterness for an extended period of time.

Senator KEFAUVER. Do you amplify that later on?

Mr. CURTIS. I will be glad to answer any questions on it.

Senator KEFAUVER. Well, I think it best for you to finish your statement, and I will come back to that.

Mr. CURTIS. All right, sir.

The most dangerous part of the proposed amendment is not in what it states, however, but in what it takes for granted. It surrenders abjectly on the basic constitutional issue of whether an irresponsible judiciary is to be the exclusive arbiter of its own powers. Such a surrender is a complete abandonment of constitutional principle. As with any other abandonment of principle, it carries with it the seed of its own destruction. We look at it this way: If the Supreme Court can, with complete impunity, disregard the clear mandate of article I, section 1, of the Constitution; if the Court can, with equal impunity, ignore the express language of article II, section 1, of the Constitution; if they can do the same with article III, section 2; if they can hold office, as at present, without being duly sworn as required by article VI of the Constitution; if they can ignore the express language of the 7th, 9th, and 10th amendments; and if they can do all this, who is to say them "nay" if they chance upon some new provision of the Constitution that may not be in accord with the philosophy of the current sociologists and the psychologists who have now been accepted by the Court as "modern authority." They may apply their newly instituted rule for testing constitutionality, that is to say, whether a law or practice is, in the opinion of the judges, "outmoded." If the Supreme Court can trample under foot the existing Constitution, what restraint will there be upon them to make short work of any new amendatory provisions? The position of the Defenders of the American Constitution with respect to the proposed amendment under consideration is that the Constitution is just the way we want it. We do no like what is being done to it. And we want it lived up to, in its literal text.

More direct remedies are available to the Congress for dealing with this question, remedies that are not so ponderous, cumbersome, and time-consuming as a constitutional amendment, and that have none of the objections of the proposal under consideration. One such is the bill proposed by the principal backer of Senate Joint Resolution 32, introduced by him on April 7, 1959, several months after the introduction of the proposed amendment now being considered. The Defenders of the American Constitution feel that Senator Talmadge's bill provides the more direct remedy, one that cannot be adversely interpreted by the courts, and one that the Congress has the exclusive authority, responsibility, and duty to apply. The proposed bill, S. 1953, would add a new section to chapter 21, title 28 of the United States Code, which would read as follows:

> No justice, judge or court of the United States shall have jurisdiction to hear, determine, or review, or to issue any writ, process, order, rule, decree, or command with respect to, any case, controversy, or matter relating to the administration, by any State or any political or other subdivision of any State, or any public school, public educational institution, or public educational system operated by such State or subdivision.

This bill is clearly within the congressional authority set forth in article III, section 2 of the Constitution. We strongly recommend that it be given preference over Senate Joint Resolution 32 as a much

better method of accomplishing the desired result—that of defending the American Constitution against the present danger of amendment by judicial edict.

Senator KEFAUVER. Thank you, General Curtis.

You stated, on page 2 of your statement, the last sentence:

> We believe that it is pernicious for that reason and that it would be a great mistake to proceed with it, for it would occasion much unnecessary controversy and bitterness for an extended period of time.

To what does the word "pernicious" refer?

Mr. CURTIS. The fact that it sets off the definite wording in the Constitution of this controversial subject which has never before been considered necessarily a part of the Constitution and universally it has been considered directly out of the Constitution.

Senator KEFAUVER. Then as I understand it: Is it your feeling that the *Brown* v. *School Board of Topeka* and other cases were unconstitutional decisions, and you do not want, by constitutional amendment, to give recognition to the validity of those decisions. Is that the point?

Mr. CURTIS. Exactly; yes, sir.

Senator KEFAUVER. Is that what you meant there?

Mr. CURTIS. Yes.

Senator KEFAUVER. I see. Is there anything else, General?

Mr. CURTIS. I think that covers it as far as we are concerned, Senator.

Senator KEFAUVER. Any questions, Mr. Fensterwald?

Mr. FENSTERWALD. I have just one question, Mr. Chairman.

General Curtis referred at the beginning of his statement to the very famous statement by Thomas Jefferson, "It is better to restrain public servants with the chains of a constitution"; and he went on to say that today many people think that these protective chains have been weakened and, in some instances, have disappeared entirely. General Curtis, do you consider the 14th amendment as one of these protective chains?

Mr. CURTIS. Yes, sir.

Mr. FENSTERWALD. That is the only question I have, Mr. Chairman. Thank you very much.

Senator KEFAUVER. In other words, you believe the 14th amendment was wise?

Mr. CURTIS. Just a minute, here. Let me look at the 14th amendment and see what I am agreeing to. Oh, yes.

Senator KEFAUVER. All right. Mr. Horton, do you have anything to add?

Mr. HORTON. I do not believe so.

STATEMENT OF DAVID HORTON, CHAIRMAN OF THE EXECUTIVE COUNCIL, DEFENDERS OF THE AMERICAN CONSTITUTION

Senator KEFAUVER. Did I understand you were also counsel for the Defenders of the American Constitution?

Mr. HORTON. No; I am chairman of the executive council.

Senator KEFAUVER. Chairman of the executive council. I see.

Mr. HORTON. I can send in the complete statement of this Van Buren autobiography if you would like to see it. It is a very strong, able presentation.

Senator KEFAUVER. What is that about?

Mr. HORTON. It came up in the New York Legislature when they were having a scrap over the attempted nullifications, and this was a rather extensive statement prepared by Martin Van Buren and submitted to a joint committee of the New York Legislature in 1833. And it reverses what the committee considered to be the proper qualifications for public officeholders and it ended with a resounding endorsement of General Jackson's conduct as a public official in living up to these qualifications. In the process of making this endorsement they referred to the dangerous heresy that the Constitution is to be interpreted, not by the well-understood intentions of those who framed and those who adopted it, but by what can be made out of its words by ingenious interpretation.

Senator KEFAUVER. As I understand it, Mr. Van Buren was the Governor of New York at the time?

Mr. HORTON. No, sir, he was not. I do not recall at this particular time what office he held.

Mr. CURTIS. I think he was attorney general of the State of New York.

Senator KEFAUVER. I do not know exactly what action they were talking about, but they were upholding Andrew Jackson for something he did, and I am sure he must have been right about it.

All right. Thank you, sir.

Mr. HORTON. Thank you.

Mr. FENSTERWALD. Mr. Chairman, we have received a letter from the Attorney General on this subject, which I mentioned yesterday, and I would like your permission to have that printed in the record.

Senator KEFAUVER. Without objection, it will be printed in the record. I saw by the press this morning it had been sent.

(The document referred to is as follows:)

MAY 14, 1959.

HON. ESTES KEFAUVER,
Chairman, Subcommittee on Constitutional Amendments,
Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR: This is in response to your request for the views of the Department of Justice concerning the joint resolution (S.J. Res. 32) "Proposing an amendment to the Constitution of the United States reserving to the States exclusive control over public schools."

This joint resolution proposes a constitutional amendment which would provide that "Administrative control of any public school, public educational institution, or public educational system operated by any State or by any political or other subdivision thereof, shall be vested exclusively in such State and subdivision and nothing contained in this Constitution shall be construed to deny to the residents thereof the right to determine for themselves the manner in which any such school, institution, or system is administered by such State and subdivision."

Insofar as the text of the measure seeks to reserve to the States and their subdivisions exclusive administrative control of their public schools and public school systems, neither legislation nor a constitutional amendment is necessary. At no time has either the Supreme Court or any agency of the Federal Government ever asserted any Federal right, responsibility, or disposition to participate in the exercise of such control. Of course, such State control in this area, as in all others, must be exercised in accordance with the Constitution.

However, the statement made by one of the sponsors of Senate Joint Resolution 32 at the time of its introduction indicates that the proposed amendment is intended really to overturn the Supreme Court decision in *Brown* v. *Board of Education*, 347 U.S. 483, that the 14th amendment forbids racial discrimination

in public education. If the proposed measure were so construed, the only legal ground on which such a decision could rest is that the measure makes inapplicable to the field of public education the guarantees of the 14th amendment to the Constitution. Not only would a State be free to enforce segregation in its public schools, but it would be under no obligation to provide "separate but equal" public schools for children of different races. Moreover, the guarantees embodied in the "due process" clause of the 14th amendment—including freedom of speech and freedom of religion—would be unavailable in the field of public education.

In his state of the Union message of January 9, 1959, the President said:

"We are making noticeable progress in the field of civil rights—we are moving forward toward achievement of equality of opportunity for all people everywhere in the United States. In the interest of the Nation and of each of its citizens, that progress must continue."

The adoption of this proposed amendment would constitute a step backward. The Department of Justice is strongly opposed to it.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely,

WILLIAM ROGERS, *Attorney General.*

Mr. FENSTERWALD. In addition, I have several letters from people who were not able to appear at the hearings or who do not wish to appear, but who have requested that their statements be placed in the record.

One of them is from Mr. Loyd Wright, of Los Angeles, who was to appear but who became ill. Another is from a well-known——

Senator KEFAUVER. Do you want to identify these people as you go along? Loyd Wright is who?

Mr. FENSTERWALD. At the moment he is a private attorney in Los Angeles, but his most recent job with the Government was with respect to the Commission on Government Security. He held several Government posts before that, but I do not have his biography. I can supply that.

Senator KEFAUVER. As I remember it, he was the president of the American Bar Association.

Mr. FENSTERWALD. I believe he was at one time, Mr. Chairman.

Senator KEFAUVER. Very well. His statement will be filed.

(The document referred to is as follows:)

STATEMENT OF LOYD WRIGHT

Mr. Chairman and distinguished members of the subcommittee, may I first be privileged to express my deep appreciation for the invitation to appear before you in reference to Senate Joint Resolution 32, a proposed constitutional amendment to school administration. I regret exceedingly that circumstances beyond my control, including illness, have made it impossible for me to appear personally to testify and subject myself to questions. However, I am grateful for the suggestion of your distinguished chairman that in the event I could not personally appear, your distinguished body would be happy to receive a statement from me.

At the outset may the record show that I submit my views as an individual citizen speaking on my own behalf, but sincerely believing that I bespeak the true convictions of a vast majority of the American people. This feeling on my part does not arise from conjecture or conviction that the views I hold are generally acceptable because I happen to hold them, but arise if it please the committee, from the fact that I have enjoyed the privilege the last past several years of extensive travel throughout the Nation, and the consequent opportunity and privilege of speaking with citizens throughout the land in the atmosphere of serious contemplation.

Since the turn of the century, and more particularly in the last 30 years, there has been a constant erosion of our fundamental concepts of government. We have, I fear, succumbed to present pressures and abandoned fundamental concepts for which our forefathers gave their all. For nearly 150 years our people

prospered and enjoyed latitude of endeavor and freedom of governmental interference beyond that enjoyed by any previous people in the history of the world. Then, for some reason our people became restive and our leaders became more conscious of day to day pressures than to the necessity of dedicated steadfastness to our true philosophy of government. As a result of tinkering with governmental machinery and exploring the bitter fruit of socialistic ideologies we have seen frightening and terrible changes take place in our concepts of government, without following the legal steps of amending our Constitution.

Since the advent of the direct primary and its general acceptance, I respectfully submit that all too frequently servants of the people have felt compelled to follow rather than to lead. The success of pressure groups in prevailing upon our political leaders has brought about the unhappy situation where we have all too many hyphenated Americans—those poor citizens who have an intervening loyalty and whose mental reflex no longer appraises the impact of either legislation or legal fiat upon the good of the commonwealth, but rather appraise it upon the impact upon their own selfish interests. This, of course, is not a political characteristic, but unfortunately appears to be a fundamental change in the character of our people and of those who seek to be their servants.

Gradually, we have seen the abandonment of the thought that the Federal Government should only have those powers and the jurisdiction over those matters that the States have collectively delegated to it, and that the States reserved unto themselves all except expressly delegated authority on the theory that that Government is best that governs least and the companion principle that government at home is more responsive to the will of the people. Unfortunately, apparently irked by the restraint which previous Courts had felt necessary to fulfill their constitutional duty, the Supreme Court has gotten into the act.

It is not my purpose to criticize, nor do I wish to indulge in criticism of the Court, notwithstanding the Court itself has throughout its glorious history repeatedly invited criticism of its decisions, other than to observe that it is the Congress as representatives of the people who are the ultimate guardians of the American system of government, and they and they alone are the responsitory of the power to make national policy and to change that policy in the light of changed need and conditions. It was never intended, nor can our philosophy of government long endure, if the legislative branch of our Government is to be dominated by either or both of its two companion branches. We are presently in a difficult plight. Great controversy has arisen because of what many believe, I among them, is the result of the Supreme Court setting itself up as the guardian and master of the legislative and executive branches of Government.

Judge Learned Hand, perhaps the greatest living American Judge, has been most eloquent in advancing the thought that the Court has displayed a tendency to establish itself as a third and highest house of the legislative branch of our Government. This is not the first time in our history that a Court has misconstrued the intent of the Congress, or indeed the intent of the Constitution. But if it has misconstrued that intent, as I believe it has, then it is proper and fitting as well as the sole responsibility of the legislative branch to cure such misconstructions at the earliest conceivable date, else the doctrine of estoppel may be invoked by a construction that the Congress having had an opportunity to appraise a misconstruction and agreeing with it by lack of action, has confirmed what has been done. It is no less the responsibility of the Congress under such unhappy circumstances in dealing with the Constitution to suggest constitutional amendments, for there is no other recognized legal machinery to cure a deflection.

Mr. Chairman, I would be belaboring the obvious I am sure, were I to dwell upon the intent of the framers of the Constitution in the area of delegated powers. Those of you who have been honored by your fellow citizens and elected to the Congress to preserve, as trustees if you please, our concepts of government for posterity, have a better understanding of our true philosophies of government than have I. It almost seems trite to observe that in the Federalist papers and other contemporary writings, those who were on the scene and who participated as architects of our government structure, clearly intended and repeatedly expressed the thought that the powers delegated by the Constitution to Federal Government were few and well defined. It was intended that the Federal Government should exercise its jurisdiction principally on external objects, such as war, peace, negotiations and foreign commerce, and taxation to the extent necessary to fulfill its limited responsibilities. It was thought proper that all other powers should be reserved to the several States which briefly summarized concerned the lives, the liberties, and the properties of the people and

the internal order, improvement, and prosperity of the State. Included in this grouping was the question of education in public schools. Until recently no serious minded person ever considered that the centralized Government had any jurisdiction over the school systems of the several States.

I heartily support the fundamental philosophies of Senate Joint Resolution 82, for these reasons:

1. If we are to put an end to, indeed if we are able to stop, our drift toward socialism or a strong centralized Government, the Congress must act promptly, not only in the field of education but in practically every other field of human endeavor in this great country of ours.

2. It is unthinkable to me that any responsible person believes that a Federal Government should even remotely have a superior control over the policies of a public school in any of the several States, than the State, county, and the city in which the school is located.

3. Unless the Congress by concerted action stems the tide of centralization, we will have abandoned our whole concept of government under which we and our forefathers have enjoyed privileges, liberties, and opportunities unparalleled in the history of the world.

4. Strange things have transpired in the Federal Government in the last three decades. All too frequently accident of acquaintance or political achievements have been mistaken for competence in most any line of endeavor that normally nonpolitical citizens spend a lifetime in becoming competent to handle. It is therefore an ill-conceived theory in my opinion, that because the appointed or elected citizen is called to Washington, that he, ipso facto, becomes qualified to tell the people in the community thousands of miles removed how to run its local business. Then too, unhappily, we have had instances where people so far removed were not responsive to local will and too, we have had our Hisses and others who have polluted our concepts of government and infiltrated ideologies and philosophies strange, indeed, to a people who believe in the dignity of the individual, the rule by law, and in Almighty God.

I respectfully urge that legally there is no premise for any concept that runs contrary to the fact that schools are and should always remain the business of the State and of the subdivisions of the State.

If we are to premise our acts upon that good old American attribute of reality and commonsense, then it would seem appropriate that we ask some of those who have dedicated their whole lives to the advancement of education, their viewpoint.

Dr. Frederick M. Raubinger, commissioner of education of New Jersey, in issuing a warning that a current Federal grant by the U.S. Office of Education for a national testing program, "lets the camel's nose into the tent", and involved a very grave threat of Federal control. In addressing the American Association of School Administrators at Atlantic City on February 16, 1959, he made these pertinent observations:

"I affirm that national programs of testing as here defined would be harmful to education generally, would lead specifically to a large degree of Federal control over the curriculum, methods of instruction, and guidance services in local school districts, would inevitably lead to unfair and invidious comparisons among States, among districts within States, and among pupils in a school, and could easily result in controls over pupils' opportunities for continuing their education and for exercising choice in selecting an occupation.

"The curriculum is heavily coerced when high prestige is attached to tests, from which it follows that federally sanctioned tests open the door for Federal control of or strong influence upon the curriculum. There would be the clear temptation to tie Federal testing with Federal aid and federally recommended curriculums. The full damage will thus be done. Education will be open to pressures of a contemporary Congress or by a few Members of Congress or by administrative officials who have special concerns.

"* * * Tests alone cannot substitute for the wise and mature judgment of those who know children intimately as human beings and who refuse to regard children in terms of a series of data recorded on an IBM punchcard.

"As for me, I have deep misgivings about those who, no matter how high their motives, or how solemn their assurances, assume that they and a handful of others, must manage the rest of us and our children for our own and for the Nation's good. I retain the old-fashioned notion that the education of my children and my neighbor's children is a highly personal endeavor best controlled as close to home as possible."

Like Dr. Raubinger, I too am old fashioned enough to believe that the education of the future citizens of this Nation is properly vested in the local community where those in charge may be more responsive and more responsible to the will of the people. This of course, is in addition to the fact that any other course does violence to our true philsophy of government.

As Dr. Raubinger states, I too have deep misgivings about those who, for whatever alleged high motives, assume that they and they alone know more about matters than my neighbors and I may know about those matters when they concern my own locality, and I will welcome the day when we have a renaissance of the philosophies that made the Nation great, included in which was that matters of local interest should be locally handled, the converse of which of course, is that a centralized government avariciously grasping for more and more power will take over, unmindful of the expense of the unhappy plight of the taxpayer, but bent only upon satisfying an academic or an ideological whim, which, I submit, is destructive of good government. Added to this is the ever present influence of expediency, present wherever power is centralized, which is a danger that America, presently engaged in mortal battle with a godless ideology, can ill afford in the one avenue through which properly handled future citizens, properly taught, may preserve the ground that we have lost.

Mr. Chairman and gentlemen of the subcommittee, I respectfully urge favorable consideration of the vitally necessary and imperative principle contained in Senate Joint Resolution 32 presently before you.

Respectfully submitted.

Mr. FENSTERWALD. I have a letter and a statement from Mr. Hamilton A. Long. Mr. Long recently published a pamphlet called Usurpers—Foes of Free Man, which was reviewed recently in the American Bar Association Journal, October 1958. He requested that his letter and this review of his pamphlet be put in the record.

Senator KEFAUVER. Without objection, it will be printed.

(The document referred to is as follows:)

STATEMENT IN OPPOSITION TO SENATE JOINT RESOLUTION 32—PROPOSED CONSTITUTIONAL AMENDMENT RE SCHOOLS MAY 14, 1959

To Senate Judiciary Committee,
Subcommittee on Constitutional Amendments,
Senate Office Building, Washington, D.C.:

1. Identification.—I submit this statement as an individual citizen; a member of the New York bar (since 1925, now inactive); a writer on constitutional subjects—for example the author of the 1957 brochure: "Usurpers—Foes of Free Man" (copy herewith for your information and files. It is requested that this statement be made a part of the record of your hearings, together with the attached review of the brochure from American Bar Association Journal of October 1958, by Judge Phelps of the Arizona Supreme Court—now its Chief Justice.

2. Power over education—schools.—This power has always belonged to the States exclusively under the Constitution, as amended, from 1789 to this day. As F. D. Roosevelt admitted, in his 1930 States rights address as Governor of New York—and as the American people, even high school children, then knew to be true—the Federal Government possesses no power over:

"The conduct of public utilities, of banks, of insurance, of business, of agriculture, of education, of social welfare, and of a dozen other important features."

Note especially that word "education." No amendment has been adopted since 1930 increasing Federal power. All false pretenses to the contrary of this true constitutional picture today are proved to be fraudulent by all pertinent historical records, which prove the controlling intent with which the original Constitution and each amendment were framed and adopted. The States possess, therefore, as always to date, exclusive power over education, schools.

3. All attempts by Federal officials to change the Constitution, like all anti-Constitution statements and actions by them, are null and void.—This applies, for example, to Federal usurpation of power over all of the above-mentioned prohibited fields, since 1933 as to Presidents and Congress, since 1937 as to the Supreme Court (when it started its "reverse interpretation" policy, flouting the Constitution's true meaning as to Federal power limits). For instance, the

Court's 1942 decision in the *Wickard* case, falsely pretending that the Federal Government has power under the Constitution over agriculture—to the contrary of its 1936 decision in the *Butler* ("AAA") case, was null and void, never had existence in the eyes of the Constitution. Likewise as to the 1954 decision falsely pretending that the Federal Government has power over education, schools—to the contrary of its earlier decisions soundly deciding the opposite. In the eyes of the Constitution, the status of States rights regarding schools is the same as before that 1954 decision was rendered by the Supreme Court usurpers in an attempt to change the Constitution in defiance of the people's exclusive prerogative of doing so by amendment.

4. Any attempted amendment should reflect the true constitutional picture.—Any attempted remedy for this usurpation of power by the Supreme Court, and by collaborating lower court judges, regarding schools—seeking to make them respect in practice the oath of office of all officials (to support the Constitution only), should not misrepresent the constitutional picture. Included also, of course, are all other collaborating Federal officials as usurpers, notably the President and others in the Executive Department who seek to enforce orders by usurper-judges—Supreme Court or lower courts—concerning schools, unconstitutionally.

5. Proposed amendments must be sound to merit approval and adoption.—Any unsound amendment, if adopted, would be harmful. This includes any proposed amendment which misrepresents, in effect or otherwise, the true constitutional picture.

6. The proposed amendment (S.J. Res. 32) is unsound and should be disapproved.—On its face, it pretends to be needed in order that the States may possess exclusive power over schools and thus falsifies the constitutional picture. It falsely pretends to give the States de novo this power which they now possess and always have possessed, as against the Federal Government. It thus plays into the hands of the Federal usurpers by in effect admitting that it is needed in order to counter the pertinent Court decisions commencing in 1954; by in effect admitting that those decisions have constitutional validity requiring an amendment to counter them. On its face, this proposed amendment cannot but have the effect of gravely misleading the people. To be sound, as to the school situation, the amendment should be phrased so as to make clear expressly that it is merely defining the constitutional picture as it exists today; and why confine it to schools, education, instead of bringing in all the fields of power, stated in that Roosevelt address, over which the Federal Government is usurping power wholesale and has been doing so since 1933 (by gradual steps, progressively, over the years)? See page 74 of the brochure, concerning "remedies." The amendment should be disapproved.

HAMILTON A. LONG.

NEW YORK CITY.

[Reprinted from American Bar Association Journal, October 1958]

USURPERS—FOES OF FREE MAN

(By Hamilton A. Long)

Washington said in his Farewell Address: "If in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use itself can at any time yield."

Jefferson wrote in 1823: "* * * there is no danger I apprehend so much as the consolidation of our Government by the noiseless, and therefore unalarming, instrumentality of the Supreme Court."

These classical texts may be said to form the takeoff points of this brochure by Mr. Hamilton Long, a member of the bar of the State of New York. This profound constitutional study is not only intriguing and thought-provoking, but is supported by documented evidence which makes the conclusions of the author irrefutable. The brochure is extremely timely, in that it points out the evils of the day which are transforming the Federal Government into a gov-

ernment of men instead of a government of laws; into a centralized government of unlimited powers instead of a decentralized government with definite limited powers which the provisions of the Federal Constitution clearly indicated the framers intended it to be, and which the members of State conventions ratifying it and the people whom they represented understood it to be. Mr. Long has presented a challenge to every American citizen who believes in a republican form of government under the Constitution and who desires to preserve our American way of life: Man-over-State.

He shows beyond all reasonable doubt that the framers of the Federal Constitution intended the central government to be vested with limited powers—a concept never before adopted by any other people in the history of civilization as their governmental philosophy. His main thesis as to their intent is as follows: The fundamental principles upon which this philosophy was conceived was that man was endowed with "unalienable rights", Godgiven rights at birth and "that man creates government as his tools in order to secure these rights"; that all governments derive their just powers from the consent of the governed, the people; that to preserve these rights the powers of government must be circumscribed with definite limitations and that public officials must always be subservient to the will of the people; that the creature should never become the master of the creator. These convictions were deeply seated in the minds of the framers of the Federal Constitution as the result of their comprehensive knowledge of the history of governments in the past and of their own experiences with the tyranny of British rule under the colonial regime in America and oppressive measures adopted by legislatures in some of the States after 1776 during the existence of the Confederation of States.

From this breadth of knowledge and wealth of experience they were thoroughly convinced, he says, that the safety and liberties of the people under the government they were forming could only be preserved by providing in the organic law itself for adequate curbs and safeguards against the abuse of power by those entrusted with its administration; that jealousy rather than confidence must be the polar star in forming this new government; that there must be both a limitation of its duties and a limitation of power to be exercised in performance of those duties.

These questions, the author asserts, were thoroughly explored at that time and it was the fear of the people that the Constitution as originally adopted did not fully protect them from an unwarranted restraint of their individual liberties by the Federal Government.

The coordinate branches of the Federal Government were designed to serve as checks and balances against each other and the rights reserved to the States and to the people were to serve as a safeguard against the encroachment of the Central Government upon "individual liberties" of the citizens of the various States. It was not enough, in the opinion of the people as expressed by their representatives thereafter, to create checks and balances between the coordinate branches of the Federal Government but if the goal uppermost in their minds, i.e., to keep the Government, created by them, decentralized in the future it must be realized, if at all, by expressly reserving to the States and to the people all powers of sovereignty not expressly or by necessary implication granted to the Central Government under the provisions of the organic law. The first 10 amendments to the Constitution adopted soon after its ratification were designed to achieve that result.

The author declares, in substance, that so long as the Supreme Court of the United States adhered to the cardinal rules of interpretation of the Constitution and of statutory enactments a proper balance was maintained between the executive, legislative, and judicial branches of the Federal Government and between the States and the Central Government, thus safeguarding the individual liberties of the citizens of the respective States of the Union. But when the Court no longer looks to the intent and purposes of the framers and adopters of the Constitution to determine its meaning, as it ceased to do in 1937, it aided usurpation of the powers reserved to the States as a check against centralization of power in the Federal Government which constituted the principal mechanism of the Constitution upon which the framers of that document relied to preserve to the people a definite limitation upon the powers of the Central Government.

One certainly does not have to be either a statesman, a lawyer, a judge or an intellectual to observe and to realize that by the decisions of the Supreme Court since 1937 the powers of the Federal Government have been declared to be

broadened to encompass fields of activity previously disclaimed and repudiated by the courts and by all the leading statesmen and students of government for 150 years and consequently have left only a skeleton of the rights reserved to the people and to the States. Mr. Long, in his brochure, has made this clear to the American people. This is positive evidence to all of us of the processes of national decay and the end of individual liberties in the United States.

The author in his review of the constitutional cases of the Court prior to 1937, upon which the majority of the Court relied as supporting the policy of what he terms "reverse interpretation," leads him to the opposite conclusion reached by the Court. In no instance, he declares, prior to 1937, did the Court expressly, deliberately, and voluntarily reverse a long line of consistent decisions involving the meaning of the Constitution as intended by the framers and adopters of that document. He states that in a few cases in which a prior decision was overruled, the Court was in effect choosing, of necessity, between what had come to be conflicting lines of decisions. In so doing it adopted one line of cases and overruled the other because of the need of clarification. This action of the Court, he asserts, gave no support to its 1937 "reverse interpretation" policy.

The author claims that the single proceeding entitled the *Legal Tender* cases (*Knox* v. *Lee* and *Parker* v. *Davis* (79 U.S. (12 Wallace) 457 (1871))) decided together overruling *Hepburn* v. *Griswold* (75 U.S. (8 Wallace) 603), decided in 1870, really constituted the only case which lends any support whatever to the "reverse interpretation" policy of the Court commenced in 1937. He points out that Mr. Justice Strong, who wrote the opinion for the majority of the *Legal Tender* cases, explained at length that the *Hepburn* case was decided by a less number of judges than the law provided; that it was a 5-to-3 decision (due to a vacancy); and that the Court had not been accustomed to hearing a constitutional question in the absence of the full Court if it could be avoided. Mr. Justice Strong further stated that almost immediately after the Hepburn decision was handed down, the question of reconsidering it was discussed.

A reading of the opinion in the *Legal Tender* cases should convince the reader that the Court felt reluctant to overrule the *Hepburn* case, as Mr. Long contends. It is also significant to note that in overruling the *Hepburn* case not a single member of the Court receded from his position in that case. The 5-to-4 opinion in the *Legal Tender* cases was made possible by the resignation of one of the Justices who held with the majority in the *Hepburn* case while his replacement and the newly appointed ninth member of the Court joined with the minority in the *Hepburn case*, thus constituting the majority in the *Legal Tender* cases. Mr. Long reminds his reader that Charles Evans Hughes, in his book entitled "The Supreme Court of the United States," published in 1928 before his reappointment to that Court as Chief Justice, criticized the *Legal Tender* cases overruling the *Hepburn* case the previous year, saying that it was destructive of the confidence of the people in the Court.

Mr. Long says the Court's present policy of reinterpreting the Constitution according to the will or whim of its members, in defiance of the consistent decisions of the Court for a century and a half based upon the intent of those who framed and ratified it, has already made a hollow shell of that document, to be changed again and again at will by the momentary majority of the members of the Court; that this policy has not only sanctioned usurpation of the reserved powers of the people and the States by the other two branches of the Federal Government, but the Court itself has become the prime usurper of those powers which he says has resulted in unconstitutional centralization of massive power in Washington in violation of the rights of the States, and of the people, reserved to them under the 10th amendment and has opened wide the gates to socialism-communism, which he asserts is impossible under a decentralized government.

The unforgivable sin which Mr. Long ascribes to the Court is that by its policy of "reverse interpretation" it has assumed the function and is attempting to exercise the power to amend the Constitution of the United States, a function expressly reserved to the people under its provisions. It is Mr. Long's position that an opinion of the Supreme Court interpreting a provision of the Constitution is integrated into and becomes a part of the Constitution itself and that any different interpretation thereafter placed upon it must, to be valid, be by amendment in the manner provided in the Constitution. He contends its binding effect upon the Court is therefore based upon considerations more deeply rooted than upon the common law rule of stare decisis—which is not applicable in consti-

tutional law. In other words, his position is, in effect, when the Court has once interpreted a provision of the Constitution, based upon full exploration of the intent of the framers, it has exhaused its jurisdiction and power, under our constitutional system, to consider it further except to enforce it as interpreted, leaving any change to the amendatory process of article V.

The Court prior to 1937 never expressly enunciated this as a principle of law but its history as gathered from its decisions according to Mr. Long's research might well be interpreted to harmonize with his views, in which the writer of this review concurs after examining the authorities cited by him.

M. T. PHELPS,
The Supreme Court of the State of Arizona.

Mr. FENSTERWALD. We have a letter from Mrs. Robert E. Osth from Berryville, Va., and I believe she is just a private citizen, but requests that her letter be published.

Senator KEFAUVER. Without objection, it will be printed.

(The document referred to is as follows:)

BERRYVILLE, VA., *April 10, 1959.*

Hon. ESTES KEFAUVER,
Chairman, Subcommittee on Constitutional Amendments, Senate Committee on the Judiciary, Washington, D.C.

DEAR SENATOR KEFAUVER: As I understand your subcommittee will soon hold hearings on the constitutional amendment originally proposed by Senator Talmadge (reserving to the States exclusive control over the public schools), I am writing my opinion to you in hopes that you will include my letter in the printed hearing. Please, also, place my name on the list to receive the hearings and reports.

While I am 100 percent opposed to the Supreme Court's ruling to integrate the public schools, I nevertheless cannot support Senator Talmadge's amendment.

In the first place, Federal interference in public school affairs is already prohibited by the 10th amendment. In the second place, therefore, this proposed amendment, by inference, makes school matters a constitutional matter (by prescribing how they shall be administered), thus modifying the 10th amendment. In the third place, it deals with a purely local matter in the social field, and like the prohibition amendment, does not belong in our Constitution.

The amendment carries the implication that education, under our Constitution, is compulsory, which it is not. Our Constitution does not contain the word "education," and, in fact, specifically forbids the Federal Government from exercising any powers not specifically granted it by the States or the people.

While I agree wholeheartedly with Senator Talmadge that something must be done along the line contained in his Senate speech when he proposed this amendment, I do not agree that this is the way.

Instead, we must work at the State level to eliminate control of public education by such power-pressure groups as the National Education Association and its affiliated State groups. These organizations should be a subject of congressional investigation because of their interlocking with the United Nations and other organizations. The NEA seems to be able to get collectivist textbooks into our schools so that our children are no longer learning the value of free enterprise.

And last, but not least, we need a Supreme Court consisting of men familiar with our Constitution and who believe enough in these United States that they will uphold the Constitution and fight for it against those who would destroy this country.

Yours very truly,

ELIZABETH H. OSTH.
Mrs. Robert E.

Mr. FENSTERWALD. We have a letter from Mrs. J. J. McLaughlin of Tucson, Ariz., who is secretary to an organization known as the Defenders of American Education. She has a statement for the organization, and I would like it to be printed in the record.

Mr. KEFAUVER. Let it be printed in the record.

(The document referred to is as follows:)

DEFENDERS OF AMERICAN EDUCATION,
April 29, 1959.

Hon. ESTES KEFAUVER,
Chairman, Subcommittee on Constitutional Amendment, Senate Committee on the Judiciary, Washington, D.C.

DEAR SENATOR KEFAUVER: I wish to protest any constitutional amendment which would give the Federal Government or State governments control of education.

The projected plan as outlined in Senate Joint Resolution 32 is questionable.

Inasmuch as education is a function reserved to the people and the States by the 10th amendment of the U.S. Constitution, Senate Joint Resolution 32 is unnecessary.

We do need a survey and correction of the educational problem confronting our Nation, but it certainly is not more legislation. I do not doubt but that much of the problem is due to unconstitutional legislation in the field of education.

The philosophy of the curriculum used in most of the schools should be scrutinized.

Under the influence of the National Education Association of the United States and its anti-American international (universal) program, our children are deprived of American education. Instead, they are trained for "democracy—a new social order" in most of the Nation's schools, public, private, and parochial.

The United States of America was established on natural law, moral order. If we are to perpetuate American ideals and preserve the American system of government, we must educate our youth to the historical background of our Nation.

In most of the public schools, textbooks carrying lies and misstatements and deleting true facts are the only texts available to students. The reference material available is that of well-known Socialists, "liberals" and pro-Communists. In a great many instances the student is not aware of the un-American and anti-American ideologies and backgrounds of the authors. Upon graduating from most of the high schools and colleges, students are not only woefully ignorant of the American system, but are indoctrinated with socialism and the ideology of "democracy—a new social order."

State control of education via a Federal constitutional amendment is not the solution to the educational dilemma. A return to American education is the first essential step. American education is the responsibility of the parents and the taxpayers within the community.

Nowhere in the U.S. Constitution is the word "education" as a function of Federal Government mentioned. Education is the sole responsibility of the parents and taxpayers. The jurisdiction of education is theirs and should be free of national and international control, dictation, or influence. Any infringement upon the rights of citizens in the matter of local control of education is a violation, not only of their constitutional rights, but their God-given rights.

I would appreciate it if the foregoing statement is included in the record of the hearings of the Subcommittee on Constitutional Amendments, Senate Committee on the Judiciary.

Very sincerely,

EMMA M. MCLAUGHLIN
Mrs. J. J. McLaughlin,
Chairman, Defenders of American Education.

Mr. FENSTERWALD. And last, we have a statement from Mr. J. D. Henderson of the American Association of Small Business, and he requests that his statement be published in the record.

Senator KEFAUVER. Where is his office?

Mr. FENSTERWALD. The national headquarters are in New Orleans, and I have a list of regional vice presidents.

Senator KEFAUVER. Yes, I know Mr. Henderson.

Mr. FENSTERWALD. I suggest that we publish the statement in the record.

Senator KEFAUVER. Very well; let it be printed in the record.

(The document referred to is as follows:)

AMERICAN ASSOCIATION OF SMALL BUSINESS,
New Orleans, La., May 7, 1959.

Senator ESTES KEFAUVER,
Chairman, Senate Subcommittee on Constitutional Amendments,
Washington, D.C.

DEAR SENATOR KEFAUVER: It is with sincere regret that I cannot be present to testify at the hearings before your committee, May 12, 1959, on the Talmadge amendment to the Constitution on school administration, as indicated by Senate Joint Resolution 32, but previous commitments prevent my doing so.

I shall be greatly honored if you will afford me the privilege of having this letter, as well as the enclosure mentioned herein and attached hereto, incorporated in the records of these hearings.

I want to go on record here and now as being in favor of Senate Joint Resolution 32, as presented by Senator Herman E. Talmadge of Georgia. Senator Talmadge has the courage of his convictions and in introducing Senate Joint Resolution 32 he is doing a great service for the citizens of every sovereign State in the Union.

The text of the proposed amendment, which is very short, is as follows:

"Administrative control of any public school, public educational institution, or public educational system operated by any State or by any political or other subdivision thereof, shall be vested exclusively in such State and subdivision and nothing contained in this Constitution shall be construed to deny to the residents thereof the right to determine for themselves the manner in which any school, institution, or system is administered by such State and subdivision."

By approval of Senate Joint Resolution 32 the Congress of the United States can correct one of the many disastrous decisions handed down by the Supreme Court. I will not impose on your time to recite the number of decisions which are proving detrimental to the very existence of our republican form of government as provided by the Constitution. I think the U.S. Senate and the Members of the House of Representatives should take very definite steps to return to the States all provisions of article 10 of the 10 original amendments to the Constitution, commonly called the Bill of Rights, which reads, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Unfortunately, our Founding Fathers, when drawing up the Constitution of the United States, made little reference to the appointment of Justices of the Supreme Court of the United States. Nothing was mentioned as to the qualifications of the Justices, for our Founding Fathers naturally presumed, as mentioned in section 2 or article 2, which specifies that Justices shall be appointed by the President, "by and with the advice and consent of the Senate," that the President of the United States and the Members of the U.S. Senate would be qualified to see that a man with judicial experience would be appointed to the bench.

In those days, the thought of whether a judge would lean to the right or to the left never occurred to the framers of the Constitution. Unfortunately, today such an attitude is very vital to the continued well-being of our republican form of government.

Another interesting thought which I suppose must have been running through the minds of the Founding Fathers, when they included section 1 of article 3 in the U.S. Constitution and provided Justices "shall hold offices during good behavior, and shall at stated times receive for their services a compensation, which shall not be diminished during their continuance in office." Evidently the Founding Fathers pictured in the future the appointment of able judges to the Supreme Court bench, and certainly not some people who are such poor lawyers that they never even made a living practicing law, and furthermore if these learned judges, whom we should have presiding on the Supreme Court, ever get too far to the left with their communistic thinking, it must be remembered that they are serving with the "advice and consent of the Senate." Incidentally, if the Senate cannot impeach the judges, it seems to me that they could be removed from office by taking advantage of section 1 of article 3, and diminish their compensation at some date when the Court is adjourned.

Much has been said and written about the decision of the Supreme Court on Monday, May 17, 1954, commonly called black Monday. I believe the enactment of Senate Joint Resolution 32, by Senator Talmadge of Georgia, will place the control of the public schools back into the hands of the people of the respective States of the Union.

The Supreme Court of the United States could reverse its decision of May 17, 1954, just as it reversed its decision in *Plessy* v. *Ferguson*, which decision stood the test of time for 60 years.

The Supreme Court of the United States has reversed its thinking regarding integration or segregation, if you please, by recently handing down a decision prohibiting white women from enrolling in universities which had previously confined their educational facilities to men exclusively. Now, in my opinion, that is fooling with one of the first laws of nature when the Supreme Court attempts to segregate men and women and by the same token I believe the Court has no right to force on colored people and white people the freedom of choice. God made everything, and even the Supreme Court cannot prevent birds of a feather from flocking together.

I would like to recommend that every citizen of the United States read "Nine Men Against America," by Rosalie M. Gordon. At this time I am taking the liberty of quoting from her pamphlet.

"On May 17, 1954, the Warren Supreme Court issued its revolutionary decision—a unanimous one—in the school segregation cases.

"What the Court did in that decision was not to settle the issue of segregation or integration of Negro and white pupils in the public schools. That is an issue that will plague us for many years to come—intensified almost beyond reason by the Court's decision. What the Court did do was to storm one of those last remaining bastions of a free people we have previously mentioned—the locally controlled and supported public school systems of the sovereign States. For by that decision the Supreme Court handed to the Central Government a power it had never before possessed—the power to put its grasping and omnipotent hand into a purely local function. If the Federal Government can tell the public school in your town—whether in a Northern, Southern, Western or Eastern State—who it shall or shall not admit, the next step is as logical as that winter follows fall. It will not be long before the socialist revolutionaries will have what they want—control by the Central Government of what to teach and what not to teach, how to teach it and how not to teach it in the public schools of America.

"In order to bring about this revolution of totalitarian proportions, it was necessary for Justice Warren and his colleagues to ignore 165 years of Supreme Court history and a decision of the Court that had stood unchallenged for nearly 60 years.

"In 1896 a case arose under the 14th amendment to the Constitution. This case (known as *Plessy* v. *Ferguson*) involved a State law providing for segregation of races on railroad trains. This was the case in which the Supreme Court, knowing that under the Constitution it had no right to interfere in the affairs of the sovereign States, but also cognizant of its duty to protect the rights of individual citizens, established the principle of 'separate but equal facilities.' In other words, the Court declared that so long as a State provided the same facilities, even though they be physically separated, for whites and Negroes (or impliedly for girls and boys or men and women) it was fulfilling its duty under the Constitution."

Again quoting from the pamphlet, "Nine Men Against America" by Rosalie M. Gordon:

"In any case, the 'authorities' to which the Chief Justice and his colleagues turned to justify their unlawful decision are almost beyond belief. One of them was a so-called social science expert employed by the NAACP—the principal plaintiff which brought the cases before the Court. Another was a leading exponent of progressive or 'modern' education who has been cited by a congressional committee as having been connected with at least 10 Communist-front organizations. Still another is a sociologist who has 18 Communist-front connections to his credit. First and foremost among the Court's 'authorities' was a book compiled and partly written by a Swedish Socialist. He had no knowledge whatever of race problems in America. He was brought over here and given a grant by the Carnegie Foundation to produce a book on the subject. Being a Socialist his contempt for the American Constitution is complete. He called it 'impractical and unsuited to modern conditions' and said its adoption was 'merely a plot against the common people.' This Swedish Socialist had 16 collaborators who contributed 272 articles and portions of his book. Every one of these 16 had Communist-front affiliations. He subsequently wound up in the United Nations, but even that body of outright and hooded leftists couldn't stomach his acceptance of Communist statistics and he had to resign.

These, then were the 'authorities' used by the Supreme Court to overturn 165 years of American constitutional law."

In order to give you and the members of your committee an opportunity to understand the thinking of some of our citizens who live in Northern States, I have taken the liberty of attaching hereto page 10 (the editorial page) of the Times-Picayune, New Orleans, La., Saturday, February 21, 1959, and call your particular attention to "The D.D.E.: Letter About Little Rock, New Englander, Carleton Putnam writes on Frankfurter opinion." I request that this letter from Carleton Putnam also be incorporated in the record of these hearings as a part of my letter to you, Senator Kefauver.

In closing, I wish to express to you and other Senators composing your subcommittee my thanks for your cooperation in having this communication incorporated in the hearing as indicating my approval of Senate Joint Resolution 32. Some of the members of your committee, like yourself, I have known for a number of years and this also adds to my regret that I cannot be present to give my statement in person.

I send you, the other Senators on your committee, and the members of the committee staff all good wishes, and I look forward to the pleasure of seeing you soon.

Yours for keeping small business in business, and

Very sincerely,

J. D. HENDERSON,
National Managing Director.

Mr. FENSTERWALD. We have now heard from every witness who has requested to be heard from and we have put in the record all statements which have been requested.

I might suggest that we close the hearings at this point but leave the record open for a week for any additional statements which might be sent.

Senator KEFAUVER. One or two Senators have indicated that they may want to appear and make a statement before the committee. I would like to afford them that opportunity if they wish. We will close the hearing except as to any Members of the Senate who wish to be heard early next week, and hold the record open after that time for 10 days for any additional statements.

Mr. FENSTERWALD. Should we, say, close the record on May 25 or June 1 or whatever date?

Senator KEFAUVER. Let's say on June 1.

That is all at this time, and the committee will stand in recess subject to the call of the Chair.

(Whereupon, at 10:50 a.m., the hearing was adjourned.)

CONSTITUTIONAL AMENDMENT RESERVING STATE CONTROL OVER PUBLIC SCHOOLS

THURSDAY, MAY 21, 1959

U.S. SENATE, SUBCOMMITTEE ON
CONSTITUTIONAL AMENDMENTS OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 2:30 p.m., in room 2300, New Senate Office Building, Hon. Estes Kefauver (chairman of the subcommittee) presiding.

Present: Senator Kefauver.

Also present: Bernard Fensterwald, counsel.

Senator KEFAUVER. The committee will come to order.

The committee is delighted to have the views of a very distinguished Member of the U.S. Senate, a former judge, a man in whom the chairman has a great deal of confidence, and for whom he has a great deal of respect.

STATEMENT OF HON. JOHN STENNIS, A U.S. SENATOR FROM THE STATE OF MISSISSIPPI

Senator STENNIS. Thank you very much, Mr. Chairman. It is certainly a great privilege for me to come here before you today and discuss this very, very grave problem.

I want especially to express my appreciation to you for your meeting at this particular time for me to discuss the Talmadge resolution, Senate Joint Resolution 32, relating to the administration of public schools, which reads as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as a part of the Constitution when ratified by the legislatures of three-fourths of the several States:

"ARTICLE—

"Administrative control of any public school, public educational institution, or public educational system operated by any State or by any political or other subdivision thereof, shall be vested exclusively in such State and subdivision and nothing contained in this Constitution shall be construed to deny to the residents thereof the right to determine for themselves the manner in which any such school, institution, or system is administered by such State and subdivision."

Senator STENNIS. The purpose of this amendment is to preserve forever local control of our public school system. The issue being considered today is broader than the issue of segregation. It is broader than the legalistic discussions of the scope of the 14th amend-

ment. The principle underlying this resolution is more important than the school discussions of 1954 and subsequent judicial pronouncements. It is more important than any question of whether such a decision is "the law of the land."

Administration of public schools at the local level is the heart of success of our public school system. The question of control relates, not only to States rights and individual rights, but also to community rights, for the building up of our general educational system through the country.

The question of administrative control is not limited to qualifications of students. It includes control of standards of achievement for academic work and for teachers' qualifications. It embraces control of the curriculums and the selection of textbooks.

Every local community has local problems peculiar to that community. A flexible school system within the framework of State laws establishing standards is necessary if a community school is to fulfill the needs of that community.

The very thought of dictation of our whole educational system from Washington is abhorrent to us all. I have never heard a responsible American advocate Federal control of public education throughout the country. Yet, there are many developments in government that are leading us toward this wholly undesirable goal.

The first is where the Court in 1954 uprooted established principles, dating back to 1896, and extended the scope of the 14th amendment to administration of schools. In discussing this case, it should be borne in mind that *Plessy* v. *Ferguson*, decided in 1896, dealt with interstate commerce—transportation—a field of legislative power expressly delegated to the Federal Government in the Constitution. There was no such delegation of Federal power to the Federal Government in the field of education and, indeed, every act of Congress, both before and after the 1954 decision, has indicated a consistent and unanimous intent of Congress to retain local control of public schools at State and local levels. Even the Alaskan and Hawaiian statehood bills contain language which vests control of schools in these new States in the States forever. I raise those as good examples. Similar language is found in other State enabling acts. The Congress, by the terms of the 14th amendment, has the sole power to implement the terms of that amendment; yet Congress has never acted directly to apply that amendment's terms to administration or control of local State supported schools. This legislative power has been exercised by the Supreme Court and idle school buildings in our troubled cities stand as mute testimony to the folly of their action.

Our school system has served us well and was progressing nicely until the tragic decisions in the school cases were made. These decisions have had a paralyzing effect on the community spirit and attitude toward local schools in a very large section of the country. Many of my people wonder if the local school can ever again be a truly community institution.

It is important that local control in all its phases be restored to the States and the Talmadge amendment is a constructive proposal that would stop the attack on all fronts. We have a diversity in our public school system. Some standards, unfortunately, are too low, but our people have shown themselves willing to make the sacrifices to improve these standards.

Where there is such a diverse system of education and such a diffusion of authority in our educational system, brainwashing is impossible. The future of liberty in the United States is no small measure in independence of thought, the divergence of views, and the best fundamental education possible under this system of local control. As I have said, there is a general concern about raising the "standards" of education.

To the lawyer, this word "standards" has a dual meaning. The word may be used to define levels of achievement or it may imply the governmental power to license. Existing standards of education are enforced at the local level through licensing and accreditation. This inforcement power is carefully vested in educational groups and State agencies under State law. Yet there is talk about establishing national standards for education. In his state of the Union message this year, the President of the United States stated:

> As one example, consider our schools, operated under the authority of local communities and States. In their capacity and in their quality they conform to no recognizable standards. In some places facilities are simple, in others meager. Pay of teachers ranges between wide limits, from the adequate to the shameful. As would be expected, quality of teaching varies just as widely. But to our teachers we commit the most valuable possession of the Nation and of the family—our children.
>
> We must have teachers of competence. To obtain and hold them we need standards. We need a national goal. Once established I am certain that public opinion would compel steady progress toward its accomplishment.
>
> Such studies would be helpful, I believe, to government at all levels to all individuals. The goals so established could help us see our current problems in perspective. They will spur progress.

If this power to establish and enforce standards is to be exercised at the national level, it would involve Federal licensing of teachers and accrediting individual schools. Thus we would have extreme centralization of education in one single move.

Mr. Chairman, I do not think the President was fully advocating such a conclusive step as that when he made these remarks in his address.

Senator KEFAUVER. At that point what specific congressional legislation was he talking about?

Senator STENNIS. Well, that was in his state of the Union address this year. He was talking about his committee of outstanding citizens for strengthening the Nation, you see, using as an example a review of our educational processes. It is the same thought that has been had with reference to the national education program and scholarships and so forth. Last year we passed the bill called the National Defense Education Act, but that was the general field of education he was referring to.

The point I was disturbed about is the trend of thinking—how far the thinking has already gone with reference to national standards of education, which could very well mean, you see, national standards for teachers and national standards for curriculum, and so forth.

I remember when I was a young man, Mr. Chairman, I read an article and heard some discussion about the dangers of the nationalization of education, and I was impressed with it enough to remember that over my years as one connected with public life, and as I see this picture now, that warning has become a reality.

I do not mean that I am excited over any particular single event that has happened, but I think the great source of our strength in our form of government is a good, wholesome, healthy difference of opinion, difference of ideas, difference in ideas, that come in from various parts of this country, and I would want that to be the last thing to try to nationalize, or standardize, our national education system.

I think that from a strict efficiency standpoint, we could set up some national standards here and increase the output of the schoolroom learning per day in some fields of effort, say the hard courses. We could set up standards and require them to be emphasized, and there would be a quick, temporary benefit that would come from that, we shall say.

But I think in the long run it would be very, very dangerous and it would lay the groundwork for a final, centralized, one-barreled educational program, and therefore, indirect control, at least of thought.

We have seen the encroachment of Federal legislative authority on many rights of the States in recent years. In only one real important realm of government was State power left untouched—administrative control of public schools.

In the school cases, however, the Supreme Court breached the principle of autonomy by injecting sociological considerations into public school administration. The power of the States to control locally State public education has been breached. The segregation question was the opening wedge but the principle of local control no longer remains. Now we hear talk of national standards of public educational systems. I believe that adoption of any such standards will inevitably lead to Federal licensing of all schoolteachers and of individual schools throughout the country.

I believe the restoration of this principle of local control of our public schools is the sincere desire of thinking Americans everywhere. By process of discussion and debates, the submission of this resolution would inform the people at all levels of interest of the real questions involved and the principles at stake.

Someone has pointed out in these hearings that this resolution is proposed by the southern Senators because it involves a special problem of our area of the country. This is true to a degree, but only to a degree, because the schools of the entire Nation are in jeopardy. To the remainder of the Nation it can certainly be said that tomorrow it may be your schools, your churches, or your social order that are in jeopardy.

The States have built our public school system, and it has served us well. Federal programs have stimulated this growth; the land-grant college program, vocational educational program, school lunch program and others have greatly hastened the rate of progress. But in all of these, actual control of the schools has been left to the States.

The States have been and are making a determined effort to meet the greatly increased demands on their educational systems.

I was here at some of the hearings, and it was suggested, Mr. Chairman, that to pass this proposed amendment would be to take out part of the 14th amendment that related in any way to educational systems and leave all groups at the mercy of what might be the dominant authority in the State, and the illustration was made that they could make a religious distinction.

I think, though, that what the States have done, and this has not been a Federal question at all, what the States have uniformly done throughout the Nation on educational program, shows a basic, inherent desire for public education. I know most of the States, as you know, in the South, have mandatory provisions, there shall be a public school of a minimum number of months. People do not want to seriously think about repealing those provisions. It is inherent.

Anyway, I just got un a few figures here from my own State of Mississippi, a new State school improvement program for children of both races, estimated to cost $144 million, which was undertaken before the school segregation cases were decided. Tremendous progress has been made.

I list there the figures as to new classrooms, new buildings, those approved applications, those actually under contract, and the completed classrooms and building. I would like to have that included in the record.

Senator KEFAUVER. Yes, it may be included in the record.

(The material referred to follows:)

	New classrooms			New buildings		
	Approved applications	Under contract	Completed classrooms	Approved applications	Under contract	Completed buildings
Negro	842	1,389	858	63	63	64
White	581	523	203	53	33	24
Total	1,523	1,912	1,061	116	96	88

Senator STENNIS. This desire to improve educational conditions had nothing to do with segregation or integration. It was an attempt by the local people to meet the challenge of better education for everyone. The public school system will attain greater heights by voluntary, willing effort and sacrifices at the lower level than by any Federal aid program with administrative strings attached. Our local people have shown the willingness to make the sacrifices necessary for their local schools.

In my State, at least, the great moment came right after the war when incomes had gone up, the economy had been strengthened, there was more money to pay taxes with, and this was the first public program which was launched.

Senator KEFAUVER. You mean right after World War II?

Senator STENNIS. Did I say World War I?

Senator KEFAUVER. No, you just said "after the war."

Senator STENNIS. I meant after World War II.

The fact that our public school system has worked so well results from parents' interest in their local schools. Through the PTA and other groups, they have a voice in the local school program. This high degree of local cooperation has built confidence in the public school system.

People do not want their children's education directed from Washington. The confidence of the parents, and with it the willing spirit of cooperation in meeting educational needs, is the most important factor of our free public school system. The Federal Government

cannot replace that confidence. The Talmadge resolution would preserve it.

Mr. Chairman, that resolution is nothing in the world but an affirmance of what has been the policy and what was the law until the Supreme Court, in those cases, decided to the contrary.

You know what we are up against with reference to the enforcement of the present policies; you know what we are up against with reference to the control of these matters by injunctive processes. It is just unthinkable, to me.

You will remember during the Civil Rights bill debate in 1957, the discredited title III of that bill was finally deleted—voted out—and the argument was made then that if it prevailed, it would not be long until that same feature of Government would be used in other fields, and sure enough, here, the recent so-called labor bill, the Kennedy-Ervin bill, that same principle there came in through an amendment, and one time it was actually voted in in the strongest possible language, but on more mature consideration and reflection, it was decided again that that was not really the will of the majority of the Senate, in just the words it was phrased, and protection was given—adequate protection, in my opinion—was given by a different provision.

But it does illustrate that one step leads to another, and this matter in one field leads to another field. So I think the only safe, sound, constructive place to repose this power with reference to our school system, the basic administrative control of our school system, is at the State level.

I believe if this matter could be fully debated, fully explained, and really understood at the parent level, I shall say, it would find its way to the approval of the great majority of the people of our country.

Senator KEFAUVER. Senator Stennis, I want to thank you for a very well-prepared statement and an excellent presentation.

May I ask one question, while we are discussing this matter?

Senator STENNIS. Yes, sir; ask any question you like.

Senator KEFAUVER. We have had three types of testimony, roughly three types, about this amendment: Senator Talmadge and you and others supporting the amendment as it is; others, including the Attorney General, opposing the amendment; and others with a feeling that there should be local administrative control, but that there should be some application of the 14th amendment, at least insofar as to require schools for the different races on a separate but equal basis.

Senator STENNIS. Yes.

Senator KEFAUVER. Beginning with *Plessy* v. *Ferguson*, and later, in *Gong Lum* v. *Rice*, in 1927, with an opinion by Chief Justice Taft, and still later in other school cases, there was a requirement under the 14th amendment of separate but equal school facilities.

Senator STENNIS. Yes.

Senator KEFAUVER. And they would like to see some effort made not to take away completely the protection of the 14th amendment, but to have a restatement of what the law was before the *Brown* case was decided.

Senator STENNIS. Yes.

Senator KEFAUVER. Do you want to make any comment about those different viewpoints?

Senator STENNIS. I had not thought of it as an effort to reframe the language to what the law was before this *Brown* case. But I just said there in my remarks awhile ago that the Talmadge amendment, in large measure, restores the situation, what had always been accepted as being the law before that case.

Senator Dodd, with great sincerity, raised the question the other day when Senator Talmadge was testifying, if you will recall, that this would just take out the 14th amendment and leave groups—religious groups, colored groups, and any other groups—without any protection, and he did not want to see that happen.

To my mind, the quick answer, at least to that, is that it is so inherent and so fundamental in the minds and hearts of the people, built over the decades, their desire to have public schools, that all have adequate public schools, that that is not a danger.

But now, as a practical matter, to reassure the American people, it might be better to phrase some language that would make clear the very point that you raise there, that this is not going to leave anyone unprotected; that the rights of all will be recognized, but that it will be along patterns that have been heretofore used in what has been unquestionably the law.

So I think that deserves the utmost consideration. I had not thought of it in terms of language.

Senator KEFAUVER. I think we might have great difficulty in getting language; it is a hard problem.

Senator STENNIS. I am sure I see where it would be, but it would not be impossible, and it would be reassuring to people who have these questions come to their minds. Senator Dodd had it come to his mind. Something has got to be done to take the pressure off of this situation, Senator Kefauver. I think you realize that. I wish that all here would realize it as well as you do.

I have read a great deal of Thomas Jefferson's philosophy and his saying, and I remember quite well, I used to have this instilled into me in law school, after he left the President's office, as you will recall, he went back to Virginia, a great advocate of public education. He formulated in his fertile brain a complete system of public education, and proposed it to the Virginia Legislature.

It started with the grammer school, went on up to high school and on through the university. He made a real fight for it; he had advocated the subject matter before, but he put the plan before them.

He said later, "I asked for the system and they gave me the capstone." They gave him the university.

But that State, in the course of time, you know, came right on in to be a strong advocate of the public school system, and it is in their constitution now in a mandatory way, in spite of all the trouble. They have not tried to vote it out.

Senator KEFAUVER. That is right.

Well, thank you again, Senator Stennis.

Senator STENNIS. I want to thank you again for coming over here and being so considerate of my problems.

Senator KEFAUVER. Mr. Fensterwald, did you have any questions you wanted to ask?

Mr. FENSTERWALD. I have one brief question, if the Senator would like to comment on it. This is a point that Senator Dodd requested me to pursue.

The question of Alaska and Hawaii and 10 other States has been raised a number of times. Senator Dodd was of the opinion that the acts of admission of Alaska and Hawaii and the others were subject to the Constitution to the 14th amendment, and to the requirement of equal protection of the laws; therefore, all States were admitted on an equal basis.

Have you any comment as to whether Alaska and Hawaii, for example, have more control over their schools than the State of Mississippi has over its schools.

Senator STENNIS. According to the words in the enabling act, it certainly does have. That is clear as a bell, when you just read that language alone. I think the language, you know, had a great meaning to it back there in the days when it was written in, "the older States." It meant exactly what it said.

Frankly, I do not see how those who drafted the enabling act for the admission of Alaska and Hawaii could have left it in there with the idea that the Constitution makes it meaningless, anyway. At the same time, we passed on it there. Technically, I would say that, just as a technical proposition, if the constitutional interpretation of the Supreme Court is to be followed, if that is correct—and I do not believe that it is—but if it is to be followed, I would say it writes out those provisions of the new bill.

Senator KEFAUVER. Senator Dodd, I think, argued, and I think the Attorney General in his statement took the position that these provisions for exclusive control of the schools were in these admission acts by virtue of the fact that they were Territories before that time, and the schools actually belonged to the United States. They wanted to make certain that the State and not the Federal Government owned and controlled the schools in the future. I do not know.

Senator STENNIS. Well, I do not think—my idea is that they could not possibly have been put in there except by oversight. I think they were just following some old enabling act, and it most probably happened that way. I do not think one would have used that language had they been attempting to make it clear that they were transferring jurisdiction from territorial status to State status, you know.

But I think that those acts clearly prove the sentiments of their time in this buildup, but you can argue it academically both ways, frankly, I think, as to what the meaning of those words is now.

Mr. FENSTERWALD. I did not mean to be argumentative. I was trying to bring up the point that these acts are probably subject to the Constitution, as other acts of Congress are.

Senator STENNIS. That would be a reasonable interpretation if you want to accept the Brown decision as correct. I would say it would be a reasonable interpretation, but to that constitutional amendment.

But my point is that the Oklahoma act, and all those along there, before this matter was controversial, showed what the people were thinking about and what they wanted to do about it.

Thank you again, Mr. Chairman, and thanks to Mr. Fensterwald, too.

Senator KEFAUVER. Thank you, Senator.

The committee stands adjourned, subject to the call of the Chair.

(Whereupon, at 3:02 p.m., the subcommittee adjourned subject to the call of the Chair.)

(On Monday, May 18, 1959, the subcommittee received the following supplemental statement by Senator Herman Talmadge:)

(Text of supplemental statement by U.S. Senator Herman E. Talmadge, of Georgia, to be filed today with the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary in conjunction with hearings held last week on Senator Talmadge's proposed constitutional amendment (S.J. Res. 32) to restore State and local control over public education.)

In view of the line of questioning which has been followed in the interrogation of witnesses appearing before the Subcommittee on Constitutional Amendments in support of the Talmadge school amendment (S.J. Res. 32) and in order that the record of the hearings on the Talmadge school amendment might be made unmistakably clear as to the intent and purpose of its sponsors, I am submitting this supplemental statement to set forth and emphasize the following points:

1. The Talmadge school amendment will not invalidate, weaken or modify any existing provision of the Constitution of the United States, including the 14th amendment, within the context of its language or the intent of its framers.

2. The Talmadge school amendment will not nullify or infringe in any way upon any of the inalienable rights and freedoms of the citizens of the United States, including free exercise of religious belief, as set forth in the Constitution of the United States and as carried forward in the constitutions of the respective States.

The contention of the opponents of the Talmadge school amendment that it would invalidate or "hack out" a part of the 14th amendment is a further distortion of the distortion of the true scope and intent of that article as initiated and perpetuated by judicial decree.

There is preponderant historical evidence that the framers of the 14th amendment did not intend that it should apply to the field of education. Such applicatition was a judicial afterthought.

The same 39th Congress which promulgated the 14th amendment demonstrated that that was its understanding of the intent of its framers by establishing separate schools for the races in the District of Columbia. Furthermore, of the 37 States in existence at that time, only 5 abolished separate schools contemporaneously with the ratification of that amendment and 3 of those later restored them.

Therefore, the answer to the question as to where the Nation would be educationwise should the Talmadge school amendment be submitted by Congress and ratified by the States is: back to the original intent of the framers of the 14th amendment as carried forward from the intent of the framers of the Constitution and the Bill of Rights, particularly the 10th amendment, that the conduct of education would be an exclusive function of State and local governments.

On that point, it should be reiterated and reemphasized that Madison's Journal of the Constitutional Convention relates that during a discussion of what would be placed in the hands of the Federal Government and what would be left to the States and the people, some member asked whether the provisions as proposed would leave education to the States. The only discussion of the point, according to Madison whose accuracy has never been challenged, was an answer in the affirmative by the Chairman, George Washington.

In that light it is impossible to support the thesis that any part of the body of or amendments to the Constitution would be invalidated, weakened or modified as the result of the addition of the Talmadge school amendment. Any invalidation or modification would be worked not upon the Constitution or its amendments but rather upon those decisions of the Federal judiciary which have no basis in the Constitution or its amendments.

Nothing in the Talmadge school amendment would relieve any State of its obligation within the context and intent of the 14th amendment to guarantee to all of its citizens equal protection of the laws. It would merely assure that, insofar as public education is concerned, no State could be deprived by judicial usurpation of its constitutional right to operate its public schools in accordance with the wishes of its citizens.

The Talmadge school amendment is neither a segregation nor an integration measure but rather a proposal to reassert affirmatively the time-honored right of local people to administer their schools on the State and local levels in accordance with local wishes, conditions and prevailing attitudes. Under it school patrons would be free to determine for themselves through their elected repre-

sentatives whether segregation, integration or median procedure would best serve the interests of their children and locality.

No one who truly believes in the American concept of local self-determination and government by the consent of the governed can logically disagree with the proposition that, as an ultimate matter, the determination of educational policy should rest with the parents of the children who attend each school.

It is more than coincidence that those who argue to the contrary are the same individuals who would force others to comply with their personal notions of sociology regardless of the consequences.

The fear has been expressed that the Talmadge school amendment would nullify present safeguards of religious freedom and separation of church and state. Inasmuch as the provisions of the various State constitutions in this regard would immediately come into play upon the incorporation of the Talmadge school amendment into the Constitution of the United States, that concern is groundless.

However, if it is felt by the members of the subcommittee that out of an abundance of caution the proposed amendment should be broadened to assure beyond any degree of doubt that there would be no infringement upon religious liberty and no relaxation of the doctrine of separation of church and state under its terms, the addition of such clarifying language would be welcomed by its sponsors.

The companion argument that adoption of the Talmadge school amendment would open the door to lowered standards, capricious regulations, restricted educational opportunities and all manner of fancied racial, religious, and economic discrimination is a base and self-serving canard which is a gross insult to the intelligence, vision, aspirations, and humanity of all Americans regardless of the region in which they live.

There is no responsible individual who would advocate or condone any such backward step in the quality or quantity of American education. All thinking citizens recognize that the great need of our Nation in this era of scientific and technological revolution is for more and better education and the extraordinary efforts which the citizens of the South presently are making to provide such education for all children of both races bespeaks eloquently and emphatically their sincerity and good faith in this regard.

Rather than any curtailment or infringement of educational opportunity for children of either race in the South as the result of the incorporation of the Talmadge school amendment into the Constitution, it can be stated without contradiction or equivocation that the actual effect would be an acceleration of the present effort to improve the educational opportunity of both races to justify the confidence of the remainder of the Nation in giving specific constitutional recognition to the right of the people of the South to work out solutions to their problems in accordance with prevailing wishes and conditions.

The American people will have degenerated to a sad state indeed when, as the opponents of the Talmadge school amendment maintain, the Supreme Court and its strained interpretations of the 14th amendment are the only remaining safeguards against inferior education in this country.

Fortunately for the Nation, the American people do not have so low an opinion of their conscience, sense of justice and fair play and ability to manage their own affairs as do some of their detractors on the national scene.

The contention that educational standards would be jeopardized by the adoption of the Talmadge school amendment is of itself an admission of its opponents that they desire absolute Federal control over all facets of education. Under their philosophy, the meaning of the 14th amendment could be distorted not only to give the Supreme Court authority to decree who shall attend what school but also to determine the number of teachers for each school, the amount of salaries they shall receive, and the scope of the curriculums and the content of the textbooks taught.

There has been a concerted effort throughout the hearings to discount the significance of the grants of "exclusive control" over public education made by Congress to the last 12 States to be admitted to the Union.

While it is granted that the Supreme Court which has substituted books on sociology and psychology for law books as the basis for its rulings has not passed on those provisions, it cannot be denied that there is no more convincing proof than that of the intent of Congress that the Federal Government should never interfere with the operation of public schools by the individual States.

Neither can it be denied that, inasmuch as these admission acts cannot be repealed by Congress, their grants of exclusive State power over schools occupy a status superior to that of the regular laws of the land which are repealable.

If, as is contended by the opponents of the Talmadge school amendment, the Supreme Court can invalidate these solemn pledges made to sovereign States by the Congress of the United States then no provision of any admission act is safe from legal attack.

To carry such an absurd theory to its ultimate conclusion would mean that any person dissatisfied with the disposition of public lands granted to a State could, by filing a suit in a Federal court, challenge the title to all property which once was a part of the public domain.

Therefore, the only reasonable conclusion as to the status of these admission acts is that they are at least the equivalent of treaties which, under the Constitution, are defined as the "supreme law of the land" and which, according to an impressive body of responsible legal opinion, under the present wording of the Constitution can be superior even to the provisions of that document.

To hold that the Supreme Court of the United States can rule that the language of a statehood admission act means anything other than word-for-word what it says would be to deny that the Constitution of the United States grants to Congress exclusively the authority to provide for the terms of admission of new States to the Union.

The Talmadge school amendment would do no more than to grant to all 50 States the same authority over the administration of public schools that Congress already has granted to 12 individual States.

No fair-minded person with a sense of justice could possibly object to that.

(On Thursday, May 21, 1959, the subcommittee received the following statement for the record from Senator Lister Hill of Alabama:)

STATEMENT OF SENATOR LISTER HILL

For the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee in support of Senate Joint Resoluton 32, to vest exclusive administrative control over public schools in the States and their political subdivisions

Mr. Chairman and members of the subcommittee, I deeply appreciate the decision of this subcommittee to hold hearings on Senate Joint Resolution 32, the proposed Talmadge constitutional amendment which I am privileged to cosponsor along with the distinguished Senator from Georgia and seven other of my colleagues.

Senate Joint Resolution 32 would add the following language as a new article to the Constitution of the United States:

"Administrative control of any public school, public educational institution, or public educational system operated by any State or by any political or other subdivision thereof, shall be vested exclusively in such State and subdivision and nothing contained in this Constitution shall be construed to deny to the residents thereof the right to determine for themselves the manner in which any such school, institution, or system is administered by such State and subdivision."

The Talmadge amendment would do nothing more or less than to make explicit in the basic instrument of our Government a conviction and philosophy which generations of our forebears have sought to preserve as a necessary element of a free and democratic America.

The amendment would give meaning and vitality in the field of public education to the provision which the Founding Fathers were careful to include in the Bill of Rights that the "powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States, or to the people." Since neither the Constitution nor any of the amendments thereto specifically delegate to the United States Government or prohibit to the States the administration and primary control of education in the public schools, it has been universally held that the people possess the right and obligation to exercise control over their public school systems through the instrumentalities of their State and local governments.

As my colleagues who have preceded me before this subcommittee have so forcefully demonstrated, this principle has been enunciated anew on no less than 12 occasions since 1889 in the admission of new States to the Union. The ad-

mission acts of the following States grant exclusive control and authority over the public school systems to those States: North Dakota, South Dakota, Montana, Washington, Idaho, Wyoming, Utah, Oklahoma, New Mexico, Arizona, Alaska and Hawaii.

As recently as 1958 the 85th Congress provided in the Alaska Statehood Act that: "The schools and colleges provided for in this act shall forever remain under the exclusive control of the State or its governmental subdivisions."

As recently as this year the 86th Congress provided in the Hawaii Statehood Act that Hawaii schools "shall forever remain under the exclusive control of the said State."

The Congress again last year affirmed the principle of the local nature of public schools and provided for their control on the local level when it enacted the National Defense Education Act, of which I was privileged to be coauthor. The National Defense Education Act contains the following specific language and declaration:

"The Congress reaffirms the principle and declares that the States and local communities have and must retain control over and primary responsibility for public education."

With the exception of the unwarranted decision of the Supreme Court in the school segregation cases and the subsequent decisions of the Federal judiciary ordering the integration of the races in the public schools, no responsible agency or public official that I know of has sought to deny that the control and administration of the public schools is the responsibility of State and local authorities. On the contrary, the principle has been reaffirmed not only by a long series of legislative enactments approved by the President of the United States but also by public and private study groups and by responsible educators and school officials throughout the land.

The local nature of school financing and management is exemplified in the fact that 93.4 percent of all public school revenue and 96.4 percent of all capital outlay funds for public school facilities are raised on the State and local levels. Since it is on the State and local level that our school systems are primarily supported, it is only fair and just and right that our State and local officials be given the authority commensurate with their vital responsibilities in educating our children.

During this crucial hour when we are engaged in an economic, educational, and scientific struggle with Russian communism for the minds of the people of the free world and for civilization itself, we have witnessed the sad spectacle of the Supreme Court's setting in motion the engine of possible destruction of our educational system in a large part of the country through its desegregation decisions.

We have witnessed the closing of our public schools, and the other calamitous consequences following in the wake of attempts to impose Federal control of education.

We who sponsor Senate Joint Resolution 32 ask only for the reaffirmation of the principle of local control of public education in the basic document of our Government, the Constitution of the United States.

Let us all join hands in support of this wise and sound measure which would forever end the threat of Federal control of education. Let us support this amendment that we may assure the uninterrupted instruction of all our children, and thus avert the terrible prospect of bringing up a generation of American youth in ignorance and idleness.

Let us settle once and for all that neither the Supreme Court nor any other branch of Government has the authority to take control of educational processes away from the State and local communities.

Let us reaffirm as a part of the Constitution itself the inalienable right of our citizens through their State and local governments to run their own schools.

By thus preserving this right and principle as sacrosanct, we shall greatly strengthen our America and we shall help to build an impregnable bastion of human liberty for an enlightened and free people.

(The subcommittee received the following statement from the Honorable Kenneth A. Roberts, of Alabama:)

STATEMENT OF HON. KENNETH A. ROBERTS, A REPRESENTATIVE IN CONGRESS FROM THE FOURTH DISTRICT OF ALABAMA, BEFORE THE SENATE SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS

Mr. Chairman, I deeply appreciate the privilege of expressing in this manner my wholehearted support of the resolution introduced by the distinguished junior Senator from Georgia (Mr. Talmadge).

It was a pleasure to be able to sponsor identical legislation in the House. This resolution, House Joint Resolution 337, now is pending before the House Committee on the Judiciary.

I have long insisted that education is and ought to be under exclusive control of State and local authorities; and any room left under our Constitution for the Federal Government to usurp this authority should be removed.

In its 1954 integration decree, the Supreme Court engaged in this sort of usurpation and thus set the stage for emotional pressures which are causing turmoil in a great section of our land.

We are now marking the fifth anniversary of that decree, and the issue is far from being reconciled.

It is my firm belief that a majority of the people in all parts of the country now want the control of schools removed from a judicial oligarchy and returned to them. Given the opportunity, the people can and will find the best manner in which their schools are to be administered, and they can and will solve any problems regarding education to their own satisfaction.

To amend the Constitution under the terms set forth in the Talmadge amendment would lay the proper foundation for returning to the States the authority for administration of the public schools.

Since our Constitution was adopted, the people have on 21 occasions found it expedient to the public good to amend the Constitution.

When, as in the case of prohibition and its repeal, there is involved a sociological problem on which national opinion is divided, the people found it necessary to obtain "local option" to solve the problem.

The integration of the races in the public schools has, in my estimation, approached this same status.

It is a matter of sociology, and opinion on it is divided.

The emotional side effects accompanying this question are splitting this Nation, leaving in its wake discord and strife.

Through an amendment to the Constitution, such as is proposed here, these collateral effects of forced school integration can be removed.

I implore this committee to consider favorably this proposed amendment, as a first step toward a return to constitutional law and national harmony.

Thank you for allowing me to make this expression.

(From Florida the subcommittee received the following statement from attorney general Richard W. Ervin, and the following letter from Secretary of State R. A. Gray, enclosing House Memorial No. 190 of the Florida Legislature, regular session, 1959:)

STATEMENT BY RICHARD W. ERVIN, ATTORNEY GENERAL OF FLORIDA, TO THE SENATE SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS IN RE SENATE JOINT RESOLUTION 32

Senate Joint Resolution No. 32 provides that the control of the public school system of each State shall be vested in the individual State and administered pursuant to the will of the people of each such State, and nothing in the Federal Constitution shall be otherwise construed.

Senate Joint Resolution No. 32 is predicated upon the judicial determination by the Supreme Court of the United States that the "equal protection" clause of the 14th amendment is violated when a State law provides for the separation of races in its public school system, even though equal facilities are provided. Such judicial decision thereby extends the jurisdiction of the Federal courts and the Federal Government into an area heretofore determined to be exclusively within the control and jurisdiction of the several States.

It is our contention in supporting Senate Journal Resolution 32 that the framers of the 14th amendment to the Federal Constitution never intended nor

contemplated that providing separate, equal facilities for persons of different races would be declared discriminatory and violative of the equal protection clause of the 14th amendment.

It is our sincere belief that it was not the intent of the people of the United States nor of the Congress of the United States at the time of the adopion of the 14th amendment to limit the power of the several States to regulate and control those matters which are purely State matters and which are for the benefit and welfare of all the people of the State, rather than for a minority group.

It has not been and is not the intent of the people of the State of Florida to deprive any person or groups of persons of any rights in relation to pursuing and attaining an adequate education, and I sincerely and earnestly believe that the maintenance of separate and equal facilities in the public school system does not in any way divest or deprive any person of any inalienable or constitutional right nor does it in any way serve as a detriment to the educational opportunities of any person of this State.

The above-mentioned judicial interpretation placed upon the 14th amendment has served to enable the Federal Government to overstep the boundary created by the people of the United States by virtue of the adoption of the 10th amendment to the Federal Constitution which reserved to the several States and the people thereof all matters not specifically delegated to the Federal Government.

The said decision of the U.S. Supreme Court constitutes an unlawful usurpation of power from the legislative branch of the Government, amounting in effect to legislation by the judiciary branch of the Government, contrary to the constitutional concept of separation of powers and all other recognized interpretations of the Constitution of the United States as handed down for nearly 100 years.

In addition to the legal controversy caused by said decision, we in Florida see a more immediate, local problem concerning the continued operation of our public school system.

We recognize that the operation of the public school system of the State is necessary to good government and for the education of the citizens of the State, but that the public school system is subject to complex local school problems which are for the most part unique to the locale in which they exist. The geographic, economic, and social composition of the communities and political subdivisions of the State of Florida in which the public schools are operated varies throughout the State. Because of this diversity, it is illogical and unreasonable to attempt to apply and inflexible rule or standards of school policy uniformly to each community, county, or school district of the State.

It is the earnest and sincere purpose of the people of this State to promote good education and order in the public schools of the State by fostering peaceful relationships between the races in the aftermath of the decision of the U.S. Supreme Court dictating school operating policy to the public school systems of the several States.

The primary responsibility for evaluating, elucidating, assessing and solving these local school problems vests, not in the Federal Government, but in the local school authorities who, because of their close proximity to the local obstacles and situations, may adopt measures to meet the unique needs of their particular schools in a manner consistent with good governmental and democratic principles.

Each county board needs to be guided by flexible principles based upon reason, practicality and feasibility.

At stake is the educational system of the State and the adherence to the fundamental concepts of individual freedom and responsibility for good government vested in the people of Florida, as well as the happiness of mankind which may only be accomplished by the maintenance and furtherance of the existing system of public school education in the State, free from the disrupting influences of strife, disorder and other factors which may result from forced integration of the races in the public schools.

I am pleased to report that Florida is among those Southern States which are pursuing a positive, progressive program designed to meet the vital needs of the State for a more adequate and efficient educational system with the goal of preventing the present system from lapsing into mediocrity and antiquity and encompassing the need of the State to project itself further into the fields of scholastic excellence and academic achievement. Inherent within this plan is the continuation of the educational system as a public function and for the efficient support of the public school system. Implicity within this program is the provision for the establishment of academic units of instruc-

tion facilities and curricula geared to meet the challenge of the neotechnological era in which the paramount objective is the establishment of a system of State education which may best keep within the progress of the age.

Such a program is predicated upon the wishes of the majority of the people of the State that the public schools continue to be operated upon a separate but equal basis and that any arbitrary relocation of the races within the public school system would not be tolerated by the people of the State of Florida, and that the resulting strife, disorder and disorganization would not only be fatal to the ambitious program outlined herein but be fatal to public education in the State as a whole and have a definite overall adverse effect upon education in the South from which recovery would not be made for many years.

In Florida the continued operation of school facilities for persons of different races will fit into the overall plan for academic excellence in the State whereby both races will benefit equally and which will in turn greatly enhance the educational standards of the South and of the Nation.

The disrupting influence of forcing upon the people of this State an edict which is not and which will not be condoned and which in our opinion is not properly legally within the power of the U.S. Supreme Court to enact, would adversely affect not only the Negro and white races of the South, but of the Nation as a whole as well.

Therefore, it is our opinion that it is highly desirable to elucidate in clear and unmistakable terms the interpretation of the 14th amendment which the people of the United States desire to have placed thereon, and it is further felt that the Supreme Court should not be permitted to further invade the rights of the States, especially in the field of education.

For the reasons enumerated herein, we support Senate Joint Resolution 32 and sincerely believe it should be adopted as a solution to and preventive measure for the adverse situations which are imminent in the South.

TALLAHASSEE, FLA., *June 1, 1959.*

Hon. GEORGE A. SMATHERS,
U.S. Senate, Washington, D.C.

DEAR SENATOR SMATHERS: As directed by the Florida Legislature, regular session 1959, I am transmitting herewith a copy of House Memorial No. 190, as filed in this office.

Very truly yours,

R. A. GRAY, *Secretary of State.*

SENATE COMMITTEE SUBSTITUTE FOR HOUSE MEMORIAL NO. 190

A memorial to the Congress of the United States to pass a joint resolution proposing an amendment to the Constitution of the United States reserving to the States exclusive control over public education

Whereas on January 27, 1959, Senator Talmadge of Georgia and others introduced a joint resolution in the Senate of the United States proposing an amendment to the Constitution of the United States, reserving to the States exclusive control over public schools; and

Whereas Congressman Robert L. F. Sikes, of Florida, on the 29th day of January 1959 introduced a joint resolution in the House of Representatives of the Congress of the United States, proposing an amendment to the Constitution of the United States, providing that the judicial powers of the United States shall not give the Supreme Court of the United States the power to overrule, modify, or change any prior decision of that Court construing the Constitution of the United States or an act of Congress promulgated pursuant thereto; and

Whereas the Legislature of the State of Florida is in accord with the purpose and intent of these resolutions: Now, therefore, be it

Resolved by the Legislature of the State of Florida, That the Congress of the United States is requested to pass the joint resolutions known as Senate Joint Resolution 32 and House Joint Resolution 201 of the 86th Congress, and that the Congress do move with all possible haste to adopt the said resolution and submit to the respective States for ratification the proposed amendment; and be it further

Resolved, That copies of this memorial be dispatched to the President of the United States; the Vice President of the United States; to the Honorable Lyndon Johnson, majority leader in the Senate of the United States; to the Speaker

of the House of Representatives of the United States, and to Spessard Holland and George A. Smathers of Florida; and to Congressmen Robert L. F. Sikes, William C. Cramer, Charles E. Bennett, Sydney A. Herlong, Jr., James A. Haley, Dante B. Fascell, Paul G. Rogers, and D. R. (Billy) Matthews.

Filed in Office, Secretary of State, May 25, 1959.

(The subcommittee received the following letter and statement, dated May 20, 1959, from the Women's International League for Peace and Freedom:)

WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM,
Washington, D.C., May 20, 1959.

MR. FENSTERWALD,
Counsel, Senate Subcommittee on Constitutional Amendments, New Senate Office Building, Washington, D.C.

DEAR MR. FENSTERWALD: The Women's International League for Peace and Freedom would like to file a statement on Senate Joint Resolution 32, on which your subcommittee has recently held hearings.

Thank you for informing us that the record is still open for filing statements on Senate Joint Resolution 32. I am accordingly enclosing copies of our statement.

Sincerely yours,

ADA WARDLAW, *Office Secretary.*

STATEMENT BY THE U.S. SECTION, WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM ON SENATE JOINT RESOLUTION 32, FOR THE SENATE SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS, MAY 20, 1959

The Women's International League for Peace and Freedom, U.S. section urgently requests that this committee refuse to report Senate Joint Resolution 32. This proposed amendment to the Federal Constitution would permit a State or its political subdivisions to operate public schools as they see fit, without regard to the protection of individual or group rights afforded by the U.S. Constitution. It means that the entire Bill of Rights in the Constitution, for which we fought in establishing this Republic, can be nullified in the field of State-supported or operated public education. A State could operate its public school system without reference to those precious safeguards of due process of law and equal protection of law, which slowly and painstakingly have been developed and promulgated by our highest Court for well nigh a century.

Moreover, not only would a State be able under this resolution, if it should become a constitutional amendment, to exclude any person or groups of persons from the benefits of a public education, but it could set whatever standards it pleases for the privilege of receiving a public education. There will be no right to depend on the "due process" or "equal protection" clauses to safeguard individual rights.

Furthermore, the proposed amendment presents a real danger of a State virtually suspending constitutional guarantees in any field of activity it pleases, merely by labeling such action "educational."

The far-reaching consequences of this resolution can be cataclysmic. It can destroy the very foundation of our democracy, which the American people have built into the freest citadel in the civilized world.

(The subcommittee received two letters from Gen. U. S. Grant III, which are reproduced herewith:)

THE MILITARY ORDER OF THE LOYAL LEGION OF THE UNITED STATES,
Washington, D.C., May 30, 1959.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

MY DEAR SENATOR EASTLAND: I regret very much that absence from the city on Civil War Centennial Commission business and an important all-day conference here prevented my attending the hearings of your committee on Senator Talmadge's Senate Joint Resolution 32 "Proposing an amendment to the Constitution of the United States reserving to the States exclusive control over public schools."

If it is not too late, I would like to put the Military Order of the Loyal Legion of the United States on record as favoring the said joint resolution, which I was requested to do by the board of officers.

Respectfully and sincerely yours,

U. S. GRANT 3D, *Commander in Chief.*

SONS OF UNION VETERANS OF THE CIVIL WAR,
Washington, D.C., May 30, 1959.

HON. JAMES O. EASTLAND,
Chairman, Committee on Judiciary,
U.S. Senate, Washington, D.C.

MY DEAR SENATOR EASTLAND: I regret very much that absence from the city on business for the Civil War Centennial Commission and an all-day conference here prevented my attending the hearings of your committee on Senator Talmadge's Senate Joint Resolution 32, "Proposing an amendment to the Constitution of the United States reserving to the States exclusive control over the public schools."

If it is not too late, I would like to put the Sons of Union Veterans of the Civil War on record as favoring the said joint resolution, which I was authorized and requested to do by the council of administration of our order.

Respectfully and sincerely yours,

U. S. GRANT 3D, *Washington Representative.*

(The subcommittee received the following statement, dated May 25, 1959, from Capt. John Bradley Minnick, USMC, ret.:)

STATEMENT OF JOHN BRADLEY MINNICK OF ARLINGTON, VA., CONCERNING SENATE JOINT RESOLUTION 32 BEFORE THE SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS OF THE COMMITTEE ON THE JUDICIARY OF THE U.S. SENATE, 86TH CONGRESS, 1ST SESSION

Mr. Chairman, members of the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, I am exceedingly grateful for this opportunity to present my testimony in writing from my own knowledge and experience concerning the nature of Senate Joint Resolution 32.

I am John Bradley Minnick of Arlington, Va. I am a public lawyer by vocation and a Sunday school teacher by avocation; but constitutional law has been one of my hobbies since 1929.

Senate Joint Resolution 32 is unnecessary, premature, immature, and incomplete. In short, it is in the wrong form and before the wrong subcommittee at this time.

The resolution purports to propose an amendment to the Constitution in order to establish the basic, fixed principle of representative self-government that the States shall have exclusive control over their public schools. This is the law today. Accordingly, a constitutional amendment is unnecessary and there is no need for this resolution in its present form.

The principle sought to be established by this resolution is evidenced by the acts of Congress admitting new States to representation in the Congress of the United States commencing with North and South Dakota, Montana and Washington in 1889. It has been reenacted without change down to, through and including the acts to admit the States of Alaska and Hawaii on an equal footing; except that in 1906 it was specifically provided in the act to admit the State of Oklahoma that the provisions for the benefit of the public schools should not be construed to prevent the establishment and maintenance of separate schools for white and colored children.

A constitutional amendment is not necessary unless there is a compelling need to change the rule of law. Since no change in the law is contemplated, there is no sound reason for advocating a premature, immature and incomplete measure in the wrong form and before the wrong subcommittee.

The resolution is premature. In essence, it is intended as a countermeasure with which to combat the proposed civil rights legislation pending before the Constitutional Rights Subcommittee. In form and substance, the resolution does not meet the problem because its proponents and opponents alike are seeking to avoid the question and are afraid to come to grips with the real issue involved.

The problem is racial equality. The question is whether the people who were not parties to the proceeding and who have not had an opportunity to be heard are bound by an invalid, erroneous, false and misleading opinion of the Supreme Court; i.e., whether an opinion of the Court based upon hearsay and the false and misleading arguments advanced by the Department of Justice as a friend of the Court is the law of the land within the meaning of the Supremacy Clause of the Constitution.

Any resolution which does not afford a complete basis for full consideration and mature deliberation upon the question and issue involved is immature and serves to confuse rather than to clarify the rule of law.

The resolution is immature because it affords no basis for meeting the problem, answering the question nor coming to grips with the issue. In addition, the resolution is incomplete because it does not state the whole rule of law sought to be reaffirmed by its sponsors.

The rule of law involved in the problem, question and issue is evidenced by acts of Congress dealing with the particular problem, question and issue; and which were made law in pursuance of the Constitution, as amended after the Civil War. The laws of the United States in this regard are published and indexed. No lawyer, judge, justice, lawmaker nor department official can be heard to say he did not have knowledge and notice.

The basic, fundamental rule of law is twofold:

First, the States shall have exclusive control over their public schools forever, including the right to establish and maintain separate schools in public education. Acts to admit the new States; the false and misleading arguments advanced by the Department of Justice to the contrary, notwithstanding.

Second, there shall be no distinction on account of race or color in public education provided separate schools heretofore or hereafter established shall be held to be a compliance if the funds are divided equitably. Third Morrill Act; the invalid, erroneous, false and misleading opinion of the Supreme Court seemingly to the contrary, notwithstanding.

The false and misleading arguments advanced by the Department of Justice have so corrupted and confused the rule of law that immediate positive action is necessary. Accordingly, a resolution proper in form should be completed and matured so that the problem, question and issue may be referred back to the Constitutional Rights Subcommittee where the whole matter belongs.

In witness whereof, I have set my hand this 25th day of May, 1959.

Thank you very much for your courtesy and consideration in this matter of extreme public exigency.

(The subcommittee received (through the office of Senator Talmadge) the following correspondence with Mrs. L. W. Ballard of the National Society, United States Daughters of 1812:)

MAY 18, 1959.

Mrs. L. W. BALLARD,
Chairman of Resolutions,
National Society United States Daughters of 1812,
Washington, D.C.

DEAR MRS. BALLARD: Senator Talmadge has referred to me a copy of resolution No. 9 of your society, which supports Senate Joint Resolution 32. You may be assured that the resolution will be made a part of the printed record of the hearings on this resolution.

With every best wish.

Sincerely yours,

BERNARD FENSTERWALD, Jr., *Chief Counsel.*

U.S. SENATE,
COMMITTEE ON AGRICULTURE AND FORESTRY,
May 16, 1959.

Mrs. L. W. BALLARD,
Chairman of Resolutions,
National Society United States Daughters of 1812,
Washington, D.C.

DEAR MRS. BALLARD: Thank you for your thoughtfulness in sending me a copy of the resolution of the 67th associate council of the National Society United States Daughters of 1812 endorsing the proposed constitutional amend-

ment which eight of my colleagues and I are sponsoring to restore State and local control over public education.

It is most gratifying to know that we have the support of your society and you may be assured that we shall seek approval for our proposal in every way open to us.

Please call on me whenever I can be of service to you or the National Society United States Daughters of 1812.

With every good wish, I am

Sincerely,

HERMAN TALMADGE.

RESOLUTION No. 9—STATE AND LOCAL CONTROL OF SCHOOLS

Whereas it seems assured that Federal aid to education will be followed by Federal control of local schools: Now, therefore, be it

Resolved, That the National Society, United States Daughters of 1812, urge the support of Senate Joint Resolution 32, a proposed constitutional amendment to limit, administrative control of schools to State and State political subdivisions, introduced by Senators Talmadge, Byrd, Robertson, Johnston, Hill, Sparkman, Eastland, Stennis, and Long.

Distribution:

Senator Herman E. Talmadge, Senate Office Building.
Senator Harry Flood Byrd, Senate Office Building.
Senator A. Willis Robertson, Senate Office Building.
Senator Olin D. Johnston, Senate Office Building.
Senator Lister Hill, Senate Office Building.
Senator John J. Sparkman, Senate Office Building.
Senator James O. Eastland, Senate Office Building.
Senator John S. Stennis, Senate Office Building.
Senator Russell B. Long, Senate Office Building.

(The subcommittee also received the following telegrams with requests that they be made part of the record:)

ARLINGTON, VA., *May 15, 1959.*

Senator ESTES KEFAUVER,
Senate Office Building,
Washington, D.C.:

I wish to urge full support be given the amendment now before your committee submitted by Senator Herman Talmadge, of Georgia, regarding exclusive administrative control of public schools to the States thereof. Please make this a part of the records.

MRS. ANTOINETTE HUBBARD.

FALLS CHURCH, VA., *May 14, 1959.*

Senator ESTES KEFAUVER,
Senate Office Building,
Washington, D.C.:

Am strongly in favor of Senator Herman Talmadge's bill for amendment concerning State rights.

MAUDE PAINE.

ARLINGTON, VA.

ANNAPOLIS, MD., *May 13, 1959.*

SENATE SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS,
Old Senate Office Building:

Maryland petition committee for States' rights favors Talmadge's constitutional amendment, Senate Joint Resolution 32. Two similar amendments introduced in Maryland State Legislature in 1957 and 1959.

ROBERT L. WISEMAN,
President, Maryland Petition.

JESSUP, MD.

PLESSY *v.* FERGUSON.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 210. Argued April 18, 1896. — Decided May 18, 1896.

The statute of Louisiana, acts of 1890, No. 111, requiring railway companies carrying passengers in their coaches in that State, to provide equal, but separate, accommodations for the white and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations; and providing that no person shall be permitted to occupy seats in coaches other than the ones assigned to them, on account of the race they belong to; and requiring the officers of the passenger trains to assign each passenger to the coach or compartment assigned for the race to which he or she belongs; and imposing fines or imprisonment upon passengers insisting on going into a coach or compartment other than the one set aside for the race to which he or she belongs; and conferring upon officers of the trains power to refuse to carry on the train passengers refusing to occupy the coach or compartment assigned to them, and exempting the railway company from liability for such refusal, are not in conflict with the provisions either of the Thirteenth Amendment or of the Fourteenth Amendment to the Constitution of the United States.

THIS was a petition for writs of prohibition and certiorari, originally filed in the Supreme Court of the State by Plessy, the plaintiff in error, against the Hon. John H. Ferguson, judge of the criminal District Court for the parish of Orleans, and setting forth in substance the following facts:

That petitioner was a citizen of the United States and a resident of the State of Louisiana, of mixed descent, in the proportion of seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every recognition, right, privilege and immunity secured to the citizens of the United States of the white race by its Constitution and laws; that on June 7, 1892, he engaged and paid for a first class passage on the East Louisiana Railway from New Orleans to Covington, in the same State, and thereupon entered a passenger train, and took possession of a vacant seat in a coach where passengers of the white race were accommodated; that such railroad company was incorporated by the laws of Louisiana as a common carrier, and was not authorized to distinguish between citizens according to their race. But, notwithstanding

this, petitioner was required by the conductor, under penalty of ejection from said train and imprisonment, to vacate said coach and occupy another seat in a coach assigned by said company for persons not of the white race, and for no other reason than that petitioner was of the colored race; that upon petitioner's refusal to comply with such order, he was, with the aid of a police officer, forcibly ejected from said coach and hurried off to and imprisoned in the parish jail of New Orleans, and there held to answer a charge made by such officer to the effect that he was guilty of having criminally violated an act of the General Assembly of the State, approved July 10, 1890, in such case made and provided.

That petitioner was subsequently brought before the recorder of the city for preliminary examination and committed for trial to the criminal District Court for the parish of Orleans, where an information was filed against him in the matter above set forth, for a violation of the above act, which act the petitioner affirmed to be null and void, because in conflict with the Constitution of the United States; that petitioner interposed a plea to such information, based upon the unconstitutionality of the act of the General Assembly, to which the district attorney, on behalf of the State, filed a demurrer; that, upon issue being joined upon such demurrer and plea, the court sustained the demurrer, overruled the plea, and ordered petitioner to plead over to the facts set forth in the information, and that, unless the judge of the said court be enjoined by a writ of prohibition from further proceeding in such case, the court will proceed to fine and sentence petitioner to imprisonment, and thus deprive him of his constitutional rights set forth in his said plea, notwithstanding the unconstitutionality of the act under which he was being prosecuted; that no appeal lay from such sentence, and petitioner was without relief or remedy except by writs of prohibition and certiorari. Copies of the information and other proceedings in the criminal District Court were annexed to the petition as an exhibit.

Upon the filing of this petition, an order was issued upon the respondent to show cause why a writ of prohibition should not issue and be made perpetual, and a further order that the record of the proceedings had in the criminal cause be certified and transmitted to the Supreme Court.

To this order the respondent made answer, transmitting a certified copy of the proceedings, asserting the constitutionality of the law, and averring that, instead of pleading or admitting that he belonged to the colored race, the said Plessy declined and refused, either by pleading or otherwise, to admit that he was in any sense or in any proportion a colored man.

The case coming on for a hearing before the Supreme Court, that court was of opinion that the law under which the prosecution was had was constitutional, and denied the relief prayed for by the petitioner. *Ex parte Plessy*, 45 La. Ann. 80. Whereupon petitioner prayed for a writ of error from this court which was allowed by the Chief Justice of the Supreme Court of Louisiana.

Mr. A. W. Tourgee and *Mr. S. F. Phillips* for plaintiff in error. *Mr. F. D. McKenney* was on *Mr. Phillips's* brief.

Mr. James C. Walker filed a brief for plaintiff in error.

Mr. Alexander Porter Morse for defendant in error. *Mr. M. J. Cunningham*, Attorney General of the State of Louisiana, and *Mr. Lional Adams* were on his brief.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

This case turns upon the constitutionality of an act of the General Assembly of the State of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races. Acts 1890, No. 111, p. 152.

The first section of the statute enacts "that all railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: *Provided*, That this section shall not be construed to apply to street railroads. No person or persons, shall be admitted to occupy seats in coaches, other than, the ones, assigned, to them on account of the race they belong to."

By the second section it was enacted "that the officers of such passenger trains shall have power and are hereby required to assign each passenger to the coach or compartment used for the race to which such passenger belongs; any passenger insisting on going into a coach or compartment to which by race he does not belong, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison, and any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison; and should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this State."

The third section provides penalties for the refusal or neglect of the officers, directors, conductors and employés of railway companies to comply with the act, with a proviso that "nothing in this act shall be construed as applying to nurses attending children of the other race." The fourth section is immaterial.

The information filed in the criminal District Court charged in substance that Plessy, being a passenger between two stations within the State of Louisiana, was assigned by officers of the company to the coach used for the race to which he belonged, but he insisted upon going into a coach used by the race to which he did not belong. Neither in the information nor plea was his particular race or color averred.

The petition for the writ of prohibition averred that petitioner was seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every right, privilege and immunity secured to citizens of the United States of the white race; and that, upon such theory, he took possession of a vacant seat in a coach where passengers of the white race were accommodated, and was ordered by the conductor to vacate

said coach and take a seat in another assigned to persons of the colored race, and having refused to comply with such demand he was forcibly ejected with the aid of a police officer, and imprisoned in the parish jail to answer a charge of having violated the above act.

The constitutionality of this act is attacked upon the ground that it conflicts both with the Thirteenth Amendment of the Constitution, abolishing slavery, and the Fourteenth Amendment, which prohibits certain restrictive legislation on the part of the States.

1. That it does not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude — a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services. This amendment was said in the *Slaughter-house cases*, 16 Wall. 36, to have been intended primarily to abolish slavery, as it had been previously known in this country, and that it equally forbade Mexican peonage or the Chinese coolie trade, when they amounted to slavery or involuntary servitude, and that the use of the word "servitude" was intended to prohibit the use of all forms of involuntary slavery, of whatever class or name. It was intimated, however, in that case that this amendment was regarded by the statesmen of that day as insufficient to protect the colored race from certain laws which had been enacted in the Southern States, imposing upon the colored race onerous disabilities and burdens, and curtailing their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value; and that the Fourteenth Amendment was devised to meet this exigency.

So, too, in the *Civil Rights cases*, 109 U. S. 3, 24, it was said that the act of a mere individual, the owner of an inn, a public conveyance or place of amusement, refusing accommodations to colored people, cannot be justly regarded as imposing any badge of slavery or servitude upon the applicant, but

only as involving an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears. "It would be running the slavery argument into the ground," said Mr. Justice Bradley, "to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business."

A statute which implies merely a legal distinction between the white and colored races — a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color — has no tendency to destroy the legal equality of the two races, or reëstablish a state of involuntary servitude. Indeed, we do not understand that the Thirteenth Amendment is strenuously relied upon by the plaintiff in error in this connection.

2. By the Fourteenth Amendment, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are made citizens of the United States and of the State wherein they reside; and the States are forbidden from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or shall deprive any person of life, liberty or property without due process of law, or deny to any person within their jurisdiction the equal protection of the laws.

The proper construction of this amendment was first called to the attention of this court in the *Slaughter-house cases*, 16 Wall. 36, which involved, however, not a question of race, but one of exclusive privileges. The case did not call for any expression of opinion as to the exact rights it was intended to secure to the colored race, but it was said generally that its main purpose was to establish the citizenship of the negro; to give definitions of citizenship of the United States and of the States, and to protect from the hostile legislation of the States the privileges and immunities of citizens of the United States, as distinguished from those of citizens of the States.

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

One of the earliest of these cases is that of *Roberts* v. *City of Boston*, 5 Cush. 198, in which the Supreme Judicial Court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon the other schools. "The great principle," said Chief Justice Shaw, p. 206, "advanced by the learned and eloquent advocate for the plaintiff," (Mr. Charles Sumner,) "is, that by the constitution and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law. . . . But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security." It was held that the powers of the committee extended to the establish-

ment of separate schools for children of different ages, sexes and colors, and that they might also establish special schools for poor and neglected children, who have become too old to attend the primary school, and yet have not acquired the rudiments of learning, to enable them to enter the ordinary schools. Similar laws have been enacted by Congress under its general power of legislation over the District of Columbia, Rev. Stat. D. C. §§ 281, 282, 283, 310, 319, as well as by the legislatures of many of the States, and have been generally, if not uniformly, sustained by the courts. *State* v. *McCann*, 21 Ohio St. 198; *Lehew* v. *Brummell*, 15 S. W. Rep. 765; *Ward* v. *Flood*, 48 California, 36; *Bertonneau* v. *School Directors*, 3 Woods, 177; *People* v. *Gallagher*, 93 N. Y. 438; *Cory* v. *Carter*, 48 Indiana, 327; *Dawson* v. *Lee*, 83 Kentucky, 49.

Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the State. *State* v. *Gibson*, 36 Indiana, 389.

The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theatres and railway carriages has been frequently drawn by this court. Thus in *Strauder* v. *West Virginia*, 100 U. S. 303, it was held that a law of West Virginia limiting to white male persons, 21 years of age and citizens of the State, the right to sit upon juries, was a discrimination which implied a legal inferiority in civil society, which lessened the security of the right of the colored race, and was a step toward reducing them to a condition of servility. Indeed, the right of a colored man that, in the selection of jurors to pass upon his life, liberty and property, there shall be no exclusion of his race, and no discrimination against them because of color, has been asserted in a number of cases. *Virginia* v. *Rives*, 100 U. S. 313; *Neal* v. *Delaware*, 103 U. S. 370; *Bush* v. *Kentucky*, 107 U. S. 110; *Gibson* v. *Mississippi*, 162 U. S. 565. So, where the laws of a particular locality or the charter of a particular railway corporation has provided that no person shall be excluded from the cars on account of

color, we have held that this meant that persons of color should travel in the same car as white ones, and that the enactment was not satisfied by the company's providing cars assigned exclusively to people of color, though they were as good as those which they assigned exclusively to white persons. *Railroad Company* v. *Brown*, 17 Wall. 445.

Upon the other hand, where a statute of Louisiana required those engaged in the transportation of passengers among the States to give to all persons travelling within that State, upon vessels employed in that business, equal rights and privileges in all parts of the vessel, without distinction on account of race or color, and subjected to an action for damages the owner of such a vessel, who excluded colored passengers on account of their color from the cabin set aside by him for the use of whites, it was held to be so far as it applied to interstate commerce, unconstitutional and void. *Hall* v. *De Cuir*, 95 U. S. 485. The court in this case, however, expressly disclaimed that it had anything whatever to do with the statute as a regulation of internal commerce, or affecting anything else than commerce among the States.

In the *Civil Rights case*, 109 U. S. 3, it was held that an act of Congress, entitling all persons within the jurisdiction of the United States to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances, on land or water, theatres and other places of public amusement, and made applicable to citizens of every race and color, regardless of any previous condition of servitude, was unconstitutional and void, upon the ground that the Fourteenth Amendment was prohibitory upon the States only, and the legislation authorized to be adopted by Congress for enforcing it was not direct legislation on matters respecting which the States were prohibited from making or enforcing certain laws, or doing certain acts, but was corrective legislation, such as might be necessary or proper for counteracting and redressing the effect of such laws or acts. In delivering the opinion of the court Mr. Justice Bradley observed that the Fourteenth Amendment "does not invest Congress with power to legislate upon subjects that are within the

domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect."

Much nearer, and, indeed, almost directly in point, is the case of the *Louisville, New Orleans &c. Railway* v. *Mississippi*, 133 U. S. 587, wherein the railway company was indicted for a violation of a statute of Mississippi, enacting that all railroads carrying passengers should provide equal, but separate, accommodations for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition, so as to secure separate accommodations. The case was presented in a different aspect from the one under consideration, inasmuch as it was an indictment against the railway company for failing to provide the separate accommodations, but the question considered was the constitutionality of the law. In that case, the Supreme Court of Mississippi, 66 Mississippi, 662, had held that the statute applied solely to commerce within the State, and, that being the construction of the state statute by its highest court, was accepted as conclusive. "If it be a matter," said the court, p. 591, "respecting commerce wholly within a State, and not interfering with commerce between the States, then, obviously, there is no violation of the commerce clause of the Federal Constitution. . . . No question arises under this section, as to the power of the State to separate in different compartments interstate pas-

sengers, or affect, in any manner, the privileges and rights of such passengers. All that we can consider is, whether the State has the power to require that railroad trains within her limits shall have separate accommodations for the two races; that affecting only commerce within the State is no invasion of the power given to Congress by the commerce clause."

A like course of reasoning applies to the case under consideration, since the Supreme Court of Louisiana in the case of the *State ex rel. Abbott* v. *Hicks, Judge, et al.*, 44 La. Ann. 770, held that the statute in question did not apply to interstate passengers, but was confined in its application to passengers travelling exclusively within the borders of the State. The case was decided largely upon the authority of *Railway Co.* v. *State*, 66 Mississippi, 662, and affirmed by this court in 183 U. S. 587. In the present case no question of interference with interstate commerce can possibly arise, since the East Louisiana Railway appears to have been purely a local line, with both its termini within the State of Louisiana. Similar statutes for the separation of the two races upon public conveyances were held to be constitutional in *West Chester &c. Railroad* v. *Miles*, 55 Penn. St. 209; *Day* v. *Owen*, 5 Michigan, 520; *Chicago &c. Railway* v. *Williams*, 55 Illinois, 185; *Chesapeake &c. Railroad* v. *Wells*, 85 Tennessee, 613; *Memphis &c. Railroad* v. *Benson*, 85 Tennessee, 627; *The Sue*, 22 Fed. Rep. 843; *Logwood* v. *Memphis &c. Railroad*, 23 Fed. Rep. 318; *McGuinn* v. *Forbes*, 37 Fed. Rep. 639; *People* v. *King*, 18 N. E. Rep. 245; *Houck* v. *South Pac. Railway*, 38 Fed. Rep. 226; *Heard* v. *Georgia Railroad Co.*, 3 Int. Com. Com'n, 111; *S. C.*, 1 Ibid. 428.

While we think the enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment, we are not prepared to say that the conductor, in assigning passengers to the coaches according to their race, does not act at his peril, or that the provision of the second section of the act, that denies to the passenger compensa-

tion in damages for a refusal to receive him into the coach in which he properly belongs, is a valid exercise of the legislative power. Indeed, we understand it to be conceded by the State's attorney, that such part of the act as exempts from liability the railway company and its officers is unconstitutional. The power to assign to a particular coach obviously implies the power to determine to which race the passenger belongs, as well as the power to determine who, under the laws of the particular State, is to be deemed a white, and who a colored person. This question, though indicated in the brief of the plaintiff in error, does not properly arise upon the record in this case, since the only issue made is as to the unconstitutionality of the act, so far as it requires the railway to provide separate accommodations, and the conductor to assign passengers according to their race.

It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is *property*, in the same sense that a right of action, or of inheritance, is property. Conceding this to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.

In this connection, it is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side

of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class. Thus in *Yick Wo* v. *Hopkins*, 118 U. S. 356, it was held by this court that a municipal ordinance of the city of San Francisco, to regulate the carrying on of public laundries within the limits of the municipality, violated the provisions of the Constitution of the United States, if it conferred upon the municipal authorities arbitrary power, at their own will, and without regard to discretion, in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or the propriety of the places selected for the carrying on of the business. It was held to be a covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race. While this was the case of a municipal ordinance, a like principle has been held to apply to acts of a state legislature passed in the exercise of the police power. *Railroad Company* v. *Husen*, 95 U. S. 465; *Louisville & Nashville Railroad* v. *Kentucky*, 161 U. S. 677, and cases cited on p. 700; *Daggett* v. *Hudson*, 43 Ohio St. 548; *Capen* v. *Foster*, 12 Pick. 485; *State ex rel. Wood* v. *Baker*, 38 Wisconsin, 71; *Monroe* v. *Collins*, 17 Ohio St. 665; *Hulseman* v. *Rems*, 41 Penn. St. 396; *Orman* v. *Riley*, 15 California, 48.

So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances

is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said by the Court of Appeals of New York in *People* v. *Gallagher*, 93 N. Y. 438, 448, "this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed." Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly

or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different States, some holding that any visible admixture of black blood stamps the person as belonging to the colored race, (*State* v. *Chavers*, 5 Jones, [N. C.] 1, p. 11); others that it depends upon the preponderance of blood, (*Gray* v. *State*, 4 Ohio, 354; *Monroe* v. *Collins*, 17 Ohio St. 665); and still others that the predominance of white blood must only be in the proportion of three fourths. (*People* v. *Dean*, 14 Michigan, 406; *Jones* v. *Commonwealth*, 80 Virginia, 538.) But these are questions to be determined under the laws of each State and are not properly put in issue in this case. Under the allegations of his petition it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race.

The judgment of the court below is, therefore,

Affirmed.

Mr. Justice Harlan dissenting.

By the Louisiana statute, the validity of which is here involved, all railway companies (other than street railroad companies) carrying passengers in that State are required to have separate but equal accommodations for white and colored persons, "by providing two or more passenger coaches for each passenger train, *or* by dividing the passenger coaches by a *partition* so as to secure separate accommodations." Under this statute, no colored person is permitted to occupy a seat in a coach assigned to white persons; nor any white person, to occupy a seat in a coach assigned to colored persons. The managers of the railroad are not allowed to exercise any discretion in the premises, but are required to assign each passenger to some coach or compartment set apart for the exclusive use of his race. If a passenger insists upon going into a coach or compartment not set apart for persons of his race,

he is subject to be fined, or to be imprisoned in the parish jail. Penalties are prescribed for the refusal or neglect of the officers, directors, conductors and employés of railroad companies to comply with the provisions of the act.

Only "nurses attending children of the other race" are excepted from the operation of the statute. No exception is made of colored attendants travelling with adults. A white man is not permitted to have his colored servant with him in the same coach, even if his condition of health requires the constant, personal assistance of such servant. If a colored maid insists upon riding in the same coach with a white woman whom she has been employed to serve, and who may need her personal attention while travelling, she is subject to be fined or imprisoned for such an exhibition of zeal in the discharge of duty.

While there may be in Louisiana persons of different races who are not citizens of the United States, the words in the act, "white and colored races," necessarily include all citizens of the United States of both races residing in that State. So that we have before us a state enactment that compels, under penalties, the separation of the two races in railroad passenger coaches, and makes it a crime for a citizen of either race to enter a coach that has been assigned to citizens of the other race.

Thus the State regulates the use of a public highway by citizens of the United States solely upon the basis of race.

However apparent the injustice of such legislation may be, we have only to consider whether it is consistent with the Constitution of the United States.

That a railroad is a public highway, and that the corporation which owns or operates it is in the exercise of public functions, is not, at this day, to be disputed. Mr. Justice Nelson, speaking for this court in *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How. 344, 382, said that a common carrier was in the exercise "of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned." Mr. Justice Strong, delivering the judgment of

this court in *Olcott* v. *The Supervisors*, 16 Wall. 678, 694, said: "That railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence. Very early the question arose whether a State's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly it could not, unless taking land for such a purpose by such an agency is taking land for public use. The right of eminent domain nowhere justifies taking property for a private use. Yet it is a doctrine universally accepted that a state legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean if not that building a railroad, though it be built by a private corporation, is an act done for a public use?" So, in *Township of Pine Grove* v. *Talcott*, 19 Wall. 666, 676: "Though the corporation [a railroad company] was private, its work was public, as much so as if it were to be constructed by the State." So, in *Inhabitants of Worcester* v. *Western Railroad Corporation*, 4 Met. 564: "The establishment of that great thoroughfare is regarded as a public work, established by public authority, intended for the public use and benefit, the use of which is secured to the whole community, and constitutes, therefore, like a canal, turnpike or highway, a public easement." It is true that the real and personal property, necessary to the establishment and management of the railroad, is vested in the corporation; but it is in trust for the public."

In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the

race of citizens when the civil rights of those citizens are involved. Indeed, such legislation, as that here in question, is inconsistent not only with that equality of rights which pertains to citizenship, National and State, but with the personal liberty enjoyed by every one within the United States.

The Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country. This court has so adjudged. But that amendment having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by the Fourteenth Amendment, which added greatly to the dignity and glory of American citizenship, and to the security of personal liberty, by declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," and that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship. Finally, and to the end that no citizen should be denied, on account of his race, the privilege of participating in the political control of his country, it was declared by the Fifteenth Amendment that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude."

These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems. They had, as this court has said, a common purpose, namely, to secure "to a race recently emancipated, a race that through

many generations have been held in slavery, all the civil rights that the superior race enjoy." They declared, in legal effect, this court has further said, "that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color." We also said: "The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race — the right to exemption from unfriendly legislation against them distinctively as colored — exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." It was, consequently, adjudged that a state law that excluded citizens of the colored race from juries, because of their race and however well qualified in other respects to discharge the duties of jurymen, was repugnant to the Fourteenth Amendment. *Strauder* v. *West Virginia*, 100 U. S. 303, 306, 307; *Virginia* v. *Rives*, 100 U. S. 313; *Ex parte Virginia*, 100 U. S. 339; *Neal* v. *Delaware*, 103 U. S. 370, 386; *Bush* v. *Kentucky*, 107 U. S. 110, 116. At the present term, referring to the previous adjudications, this court declared that "underlying all of those decisions is the principle that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government or the States against any citizen because of his race. All citizens are equal before the law." *Gibson* v. *Mississippi*, 162 U. S. 565.

The decisions referred to show the scope of the recent amendments of the Constitution. They also show that it is not within the power of a State to prohibit colored citizens, because of their race, from participating as jurors in the administration of justice.

It was said in argument that the statute of Louisiana does

not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travellers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while travelling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary. The fundamental objection, therefore, to the statute is that it interferes with the personal freedom of citizens. "Personal liberty," it has been well said, "consists in the power of locomotion, of changing situation, or removing one's person to whatsoever places one's own inclination may direct, without imprisonment or restraint, unless by due course of law." 1 Bl. Com. *134. If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so, and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.

It is one thing for railroad carriers to furnish, or to be required by law to furnish, equal accommodations for all whom they are under a legal duty to carry. It is quite another thing for government to forbid citizens of the white and black races from travelling in the same public conveyance, and to punish officers of railroad companies for permitting persons of the two races to occupy the same passenger coach. If a State can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in street cars or in open vehicles on a public road

or street? Why may it not require sheriffs to assign whites to one side of a court-room and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day? Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the State require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?

The answer given at the argument to these questions was that regulations of the kind they suggest would be unreasonable, and could not, therefore, stand before the law. Is it meant that the determination of questions of legislative power depends upon the inquiry whether the statute whose validity is questioned is, in the judgment of the courts, a reasonable one, taking all the circumstances into consideration? A statute may be unreasonable merely because a sound public policy forbade its enactment. But I do not understand that the courts have anything to do with the policy or expediency of legislation. A statute may be valid, and yet, upon grounds of public policy, may well be characterized as unreasonable. Mr. Sedgwick correctly states the rule when he says that the legislative intention being clearly ascertained, "the courts have no other duty to perform than to execute the legislative will, without any regard to their views as to the wisdom or justice of the particular enactment." Stat. & Const. Constr. 324. There is a dangerous tendency in these latter days to enlarge the functions of the courts, by means of judicial interference with the will of the people as expressed by the legislature. Our institutions have the distinguishing characteristic that the three departments of government are coördinate and separate. Each must keep within the limits defined by the Constitution. And the courts best discharge their duty by executing the will of the law-making power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives. Statutes must always have a reasonable construction. Sometimes they are to be construed strictly; sometimes, liberally, in order to carry out the legisla-

tive will. But however construed, the intent of the legislature is to be respected, if the particular statute in question is valid, although the courts, looking at the public interests, may conceive the statute to be both unreasonable and impolitic. If the power exists to enact a statute, that ends the matter so far as the courts are concerned. The adjudged cases in which statutes have been held to be void, because unreasonable, are those in which the means employed by the legislature were not at all germane to the end to which the legislature was competent.

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott case.* It was adjudged in that case that the descendants of Africans who were imported into this country and sold as slaves were not included nor intended to be included under the word "citizens" in the Constitution, and could not claim any of the rights and privileges which that instrument provided for and secured to citizens of the United States; that at the time of the adoption of the Constitution they were "considered as a subordinate and inferior class of beings, who had been subjugated by the dominant

race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them." 19 How. 393, 404. The recent amendments of the Constitution, it was supposed, had eradicated these principles from our institutions. But it seems that we have yet, in some of the States, a dominant race — a superior class of citizens, which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race. The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution, by one of which the blacks of this country were made citizens of the United States and of the States in which they respectively reside, and whose privileges and immunities, as citizens, the States are forbidden to abridge. Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States without regard to race. State enactments, regulating the enjoyment of civil rights, upon the basis of race, and cunningly devised to defeat legitimate results of the

war, under the pretence of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned. This question is not met by the suggestion that social equality cannot exist between the white and black races in this country. That argument, if it can be properly regarded as one, is scarcely worthy of consideration; for social equality no more exists between two races when travelling in a passenger coach or a public highway than when members of the same races sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the streets of a city or town, or when they are in the same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot-box in order to exercise the high privilege of voting.

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled, by law, to participate in the political control of the State and nation, who are not excluded, by law or by reason of their race, from public stations of any kind, and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race. It is scarcely just to say that a colored citizen should not object to occupying a public coach assigned to his own race. He does not object, nor, perhaps, would he object to separate coaches for his race, if his rights under the law were recognized. But he objects, and ought never to cease objecting to the proposition, that citizens of the white and black races can be adjudged criminals because they sit, or claim the right to sit, in the same public coach on a public highway.

The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.

If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.

The result of the whole matter is, that while this court has frequently adjudged, and at the present term has recognized the doctrine, that a State cannot, consistently with the Constitution of the United States, prevent white and black citizens, having the required qualifications for jury service, from sitting in the same jury box, it is now solemnly held that a State may prohibit white and black citizens from sitting in the same passenger coach on a public highway, or may require that they be separated by a "partition," when in the same passenger coach. May it not now be reasonably expected that astute men of the dominant race, who affect to be disturbed at the possibility that the integrity of the white race may be corrupted, or that its supremacy will be imperilled, by contact on public highways with black people, will endeavor to procure statutes requiring white and black jurors to be separated in the jury box by a "partition," and that, upon retiring from the court room to consult as to their verdict, such partition, if it be a moveable one, shall be taken to their consultation room, and set up in such way as to prevent black jurors from coming too close to their brother jurors of the white race. If the "partition" used in the court room happens to be stationary, provision could be made for screens with openings through

which jurors of the two races could confer as to their verdict without coming into personal contact with each other. I cannot see but that, according to the principles this day announced, such state legislation, although conceived in hostility to, and enacted for the purpose of humiliating citizens of the United States of a particular race, would be held to be consistent with the Constitution.

I do not deem it necessary to review the decisions of state courts to which reference was made in argument. Some, and the most important, of them are wholly inapplicable, because rendered prior to the adoption of the last amendments of the Constitution, when colored people had very few rights which the dominant race felt obliged to respect. Others were made at a time when public opinion, in many localities, was dominated by the institution of slavery; when it would not have been safe to do justice to the black man; and when, so far as the rights of blacks were concerned, race prejudice was, practically, the supreme law of the land. Those decisions cannot be guides in the era introduced by the recent amendments of the supreme law, which established universal civil freedom, gave citizenship to all born or naturalized in the United States and residing here, obliterated the race line from our systems of governments, National and State, and placed our free institutions upon the broad and sure foundation of the equality of all men before the law.

I am of opinion that the statute of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that State, and hostile to both the spirit and letter of the Constitution of the United States. If laws of like character should be enacted in the several States of the Union, the effect would be in the highest degree mischievous. Slavery, as an institution tolerated by law would, it is true, have disappeared from our country, but there would remain a power in the States, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom; to regulate civil rights, common to all citizens, upon the basis of race; and to place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community called the

People of the United States, for whom, and by whom through representatives, our government is administered. Such a system is inconsistent with the guarantee given by the Constitution to each State of a republican form of government, and may be stricken down by Congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding.

For the reasons stated, I am constrained to withhold my assent from the opinion and judgment of the majority.

MR. JUSTICE BREWER did not hear the argument or participate in the decision of this case.

BROWN ET AL. *v.* BOARD OF EDUCATION OF TOPEKA ET AL.

NO. 1. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.*

Argued December 9, 1952.—Reargued December 8, 1953.—Decided May 17, 1954.

Segregation of white and Negro children in the public schools of a State solely on the basis of race, pursuant to state laws permitting or requiring such segregation, denies to Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment—even though the physical facilities and other "tangible" factors of white and Negro schools may be equal. Pp. 486–496.

(a) The history of the Fourteenth Amendment is inconclusive as to its intended effect on public education. Pp. 489–490.

(b) The question presented in these cases must be determined, not on the basis of conditions existing when the Fourteenth Amendment was adopted, but in the light of the full development of public education and its present place in American life throughout the Nation. Pp. 492–493.

(c) Where a State has undertaken to provide an opportunity for an education in its public schools, such an opportunity is a right which must be made available to all on equal terms. P. 493.

(d) Segregation of children in public schools solely on the basis of race deprives children of the minority group of equal educational opportunities, even though the physical facilities and other "tangible" factors may be equal. Pp. 493–494.

(e) The "separate but equal" doctrine adopted in *Plessy* v. *Ferguson*, 163 U. S. 537, has no place in the field of public education. P. 495.

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*Together with No. 2, *Briggs et al.* v. *Elliott et al.*, on appeal from the United States District Court for the Eastern District of South Carolina, argued December 9–10, 1952, reargued December 7–8, 1953; No. 4, *Davis et al.* v. *County School Board of Prince Edward County, Virginia, et al.*, on appeal from the United States District Court for the Eastern District of Virginia, argued December 10, 1952, reargued December 7–8, 1953; and No. 10, *Gebhart et al.* v. *Belton et al.*, on certiorari to the Supreme Court of Delaware, argued December 11, 1952, reargued December 9, 1953.

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(f) The cases are restored to the docket for further argument on specified questions relating to the forms of the decrees. Pp. 495–496.

Robert L. Carter argued the cause for appellants in No. 1 on the original argument and on the reargument. *Thurgood Marshall* argued the cause for appellants in No. 2 on the original argument and *Spottswood W. Robinson, III*, for appellants in No. 4 on the original argument, and both argued the causes for appellants in Nos. 2 and 4 on the reargument. *Louis L. Redding* and *Jack Greenberg* argued the cause for respondents in No. 10 on the original argument and *Jack Greenberg* and *Thurgood Marshall* on the reargument.

On the briefs were *Robert L. Carter, Thurgood Marshall, Spottswood W. Robinson, III, Louis L. Redding, Jack Greenberg, George E. C. Hayes, William R. Ming, Jr., Constance Baker Motley, James M. Nabrit, Jr., Charles S. Scott, Frank D. Reeves, Harold R. Boulware* and *Oliver W. Hill* for appellants in Nos. 1, 2 and 4 and respondents in No. 10; *George M. Johnson* for appellants in Nos. 1, 2 and 4; and *Loren Miller* for appellants in Nos. 2 and 4. *Arthur D. Shores* and *A. T. Walden* were on the Statement as to Jurisdiction and a brief opposing a Motion to Dismiss or Affirm in No. 2.

Paul E. Wilson, Assistant Attorney General of Kansas, argued the cause for appellees in No. 1 on the original argument and on the reargument. With him on the briefs was *Harold R. Fatzer*, Attorney General.

John W. Davis argued the cause for appellees in No. 2 on the original argument and for appellees in Nos. 2 and 4 on the reargument. With him on the briefs in No. 2 were *T. C. Callison*, Attorney General of South Carolina, *Robert McC. Figg, Jr., S. E. Rogers, William R. Meagher* and *Taggart Whipple*.

J. Lindsay Almond, Jr., Attorney General of Virginia, and *T. Justin Moore* argued the cause for appellees in No. 4 on the original argument and for appellees in Nos. 2 and 4 on the reargument. On the briefs in No. 4 were *J. Lindsay Almond, Jr.*, Attorney General, and *Henry T. Wickham*, Special Assistant Attorney General, for the State of Virginia, and *T. Justin Moore, Archibald G. Robertson, John W. Riely* and *T. Justin Moore, Jr.* for the Prince Edward County School Authorities, appellees.

H. Albert Young, Attorney General of Delaware, argued the cause for petitioners in No. 10 on the original argument and on the reargument. With him on the briefs was *Louis J. Finger*, Special Deputy Attorney General.

By special leave of Court, *Assistant Attorney General Rankin* argued the cause for the United States on the reargument, as *amicus curiae*, urging reversal in Nos. 1, 2 and 4 and affirmance in No. 10. With him on the brief were *Attorney General Brownell, Philip Elman, Leon Ulman, William J. Lamont* and *M. Magdelena Schoch. James P. McGranery*, then Attorney General, and *Philip Elman* filed a brief for the United States on the original argument, as *amicus curiae*, urging reversal in Nos. 1, 2 and 4 and affirmance in No. 10.

Briefs of *amici curiae* supporting appellants in No. 1 were filed by *Shad Polier, Will Maslow* and *Joseph B. Robison* for the American Jewish Congress; by *Edwin J. Lukas, Arnold Forster, Arthur Garfield Hays, Frank E. Karelsen, Leonard Haas, Saburo Kido* and *Theodore Leskes* for the American Civil Liberties Union et al.; and by *John Ligtenberg* and *Selma M. Borchardt* for the American Federation of Teachers. Briefs of *amici curiae* supporting appellants in No. 1 and respondents in No. 10 were filed by *Arthur J. Goldberg* and *Thomas E. Harris*

for the Congress of Industrial Organizations and by *Phineas Indritz* for the American Veterans Committee, Inc.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.[1]

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[1] In the Kansas case, *Brown* v. *Board of Education*, the plaintiffs are Negro children of elementary school age residing in Topeka. They brought this action in the United States District Court for the District of Kansas to enjoin enforcement of a Kansas statute which permits, but does not require, cities of more than 15,000 population to maintain separate school facilities for Negro and white students. Kan. Gen. Stat. § 72-1724 (1949). Pursuant to that authority, the Topeka Board of Education elected to establish segregated elementary schools. Other public schools in the community, however, are operated on a nonsegregated basis. The three-judge District Court, convened under 28 U. S. C. §§ 2281 and 2284, found that segregation in public education has a detrimental effect upon Negro children, but denied relief on the ground that the Negro and white schools were substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers. 98 F. Supp. 797. The case is here on direct appeal under 28 U. S. C. § 1253.

In the South Carolina case, *Briggs* v. *Elliott*, the plaintiffs are Negro children of both elementary and high school age residing in Clarendon County. They brought this action in the United States District Court for the Eastern District of South Carolina to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. S. C. Const., Art. XI, § 7; S. C. Code § 5377 (1942). The three-judge District Court, convened under 28 U. S. C. §§ 2281 and 2284, denied the requested relief. The court found that the Negro schools were inferior to the white schools and ordered the defendants to begin immediately to equalize the facilities. But the court sustained the validity of the contested provisions and denied the plaintiffs admis-

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance,

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sion to the white schools during the equalization program. 98 F. Supp. 529. This Court vacated the District Court's judgment and remanded the case for the purpose of obtaining the court's views on a report filed by the defendants concerning the progress made in the equalization program. 342 U. S. 350. On remand, the District Court found that substantial equality had been achieved except for buildings and that the defendants were proceeding to rectify this inequality as well. 103 F. Supp. 920. The case is again here on direct appeal under 28 U. S. C. § 1253.

In the Virginia case, *Davis* v. *County School Board*, the plaintiffs are Negro children of high school age residing in Prince Edward County. They brought this action in the United States District Court for the Eastern District of Virginia to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Va. Const., § 140; Va. Code § 22–221 (1950). The three-judge District Court, convened under 28 U. S. C. §§ 2281 and 2284, denied the requested relief. The court found the Negro school inferior in physical plant, curricula, and transportation, and ordered the defendants forthwith to provide substantially equal curricula and transportation and to "proceed with all reasonable diligence and dispatch to remove" the inequality in physical plant. But, as in the South Carolina case, the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 103 F. Supp. 337. The case is here on direct appeal under 28 U. S. C. § 1253.

In the Delaware case, *Gebhart* v. *Belton*, the plaintiffs are Negro children of both elementary and high school age residing in New Castle County. They brought this action in the Delaware Court of Chancery to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Del. Const., Art. X, § 2; Del. Rev. Code § 2631 (1935). The Chancellor gave judgment for the plaintiffs and ordered their immediate admission to schools previously attended only by white children, on the ground that the Negro schools were inferior with respect to teacher training, pupil-teacher ratio, extracurricular activities, physical plant, and time and distance in-

they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in *Plessy* v. *Ferguson*, 163 U. S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction.[2] Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.[3]

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volved in travel. 87 A. 2d 862. The Chancellor also found that segregation itself results in an inferior education for Negro children (see note 10, *infra*), but did not rest his decision on that ground. *Id.*, at 865. The Chancellor's decree was affirmed by the Supreme Court of Delaware, which intimated, however, that the defendants might be able to obtain a modification of the decree after equalization of the Negro and white schools had been accomplished. 91 A. 2d 137, 152. The defendants, contending only that the Delaware courts had erred in ordering the immediate admission of the Negro plaintiffs to the white schools, applied to this Court for certiorari. The writ was granted, 344 U. S. 891. The plaintiffs, who were successful below, did not submit a cross-petition.

[2] 344 U. S. 1, 141, 891.

[3] 345 U. S. 972. The Attorney General of the United States participated both Terms as *amicus curiae*.

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time.[4] In the South, the movement toward free common schools, sup-

[4] For a general study of the development of public education prior to the Amendment, see Butts and Cremin, A History of Education in American Culture (1953), Pts. I, II; Cubberley, Public Education in the United States (1934 ed.), cc. II–XII. School practices current at the time of the adoption of the Fourteenth Amendment are described in Butts and Cremin, *supra*, at 269–275; Cubberley, *supra*, at 288–339, 408–431; Knight, Public Education in the South (1922), cc. VIII, IX. See also H. Ex. Doc. No. 315, 41st Cong., 2d Sess. (1871). Although the demand for free public schools followed substantially the same pattern in both the North and the South, the development in the South did not begin to gain momentum until about 1850, some twenty years after that in the North. The reasons for the somewhat slower development in the South (*e. g.*, the rural character of the South and the different regional attitudes toward state assistance) are well explained in Cubberley, *supra*, at 408–423. In the country as a whole, but particularly in the South, the War

ported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race.[8] The doctrine of

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virtually stopped all progress in public education. *Id.*, at 427–428. The low status of Negro education in all sections of the country, both before and immediately after the War, is described in Beale, A History of Freedom of Teaching in American Schools (1941), 112–132, 175–195. Compulsory school attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states. Cubberley, *supra*, at 563–565.

[8] *Slaughter-House Cases*, 16 Wall. 36, 67–72 (1873); *Strauder* v. *West Virginia*, 100 U. S. 303, 307–308 (1880):

"It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but

"separate but equal" did not make its appearance in this Court until 1896 in the case of *Plessy* v. *Ferguson, supra,* involving not education but transportation.[6] American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education.[7] In *Cumming* v. *County Board of Education,* 175 U. S. 528, and *Gong Lum* v. *Rice,* 275 U. S. 78, the validity of the doctrine itself was not challenged.[8] In more recent cases, all on the graduate school

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declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."

See also *Virginia* v. *Rives,* 100 U. S. 313, 318 (1880); *Ex parte Virginia,* 100 U. S. 339, 344–345 (1880).

[6] The doctrine apparently originated in *Roberts* v. *City of Boston,* 59 Mass. 198, 206 (1850), upholding school segregation against attack as being violative of a state constitutional guarantee of equality. Segregation in Boston public schools was eliminated in 1855. Mass. Acts 1855, c. 256. But elsewhere in the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.

[7] See also *Berea College* v. *Kentucky,* 211 U. S. 45 (1908).

[8] In the *Cumming* case, Negro taxpayers sought an injunction requiring the defendant school board to discontinue the operation of a high school for white children until the board resumed operation of a high school for Negro children. Similarly, in the *Gong Lum* case, the plaintiff, a child of Chinese descent, contended only that state authorities had misapplied the doctrine by classifying him with Negro children and requiring him to attend a Negro school.

level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337; *Sipuel* v. *Oklahoma*, 332 U. S. 631; *Sweatt* v. *Painter*, 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt* v. *Painter*, *supra*, the Court expressly reserved decision on the question whether *Plessy* v. *Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt* v. *Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors.[9] Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout

[9] In the Kansas case, the court below found substantial equality as to all such factors. 98 F. Supp. 797, 798. In the South Carolina case, the court below found that the defendants were proceeding "promptly and in good faith to comply with the court's decree." 103 F. Supp. 920, 921. In the Virginia case, the court below noted that the equalization program was already "afoot and progressing" (103 F. Supp. 337, 341); since then, we have been advised, in the Virginia Attorney General's brief on reargument, that the program has now been completed. In the Delaware case, the court below similarly noted that the state's equalization program was well under way. 91 A. 2d 137, 149.

the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In *Sweatt* v. *Painter, supra,* in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin* v. *Oklahoma State Regents, supra,* the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."

Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." [10]

Whatever may have been the extent of psychological knowledge at the time of *Plessy* v. *Ferguson*, this finding is amply supported by modern authority.[11] Any lan-

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[10] A similar finding was made in the Delaware case: "I conclude from the testimony that in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated." 87 A. 2d 862, 865.

[11] K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol. 259 (1948); Chein, What are the Psychological Effects of

guage in *Plessy* v. *Ferguson* contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.[12]

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term.[13] The Attorney General

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Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44–48; Frazier, The Negro in the United States (1949), 674–681. And see generally Myrdal, An American Dilemma (1944).

[12] See *Bolling* v. *Sharpe*, *post*, p. 497, concerning the Due Process Clause of the Fifth Amendment.

[13] "4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(*a*) would a decree necessarily follow providing that, within the

of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as *amici curiae* upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.[14]

It is so ordered.

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limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(*b*) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

"5. On the assumption on which questions 4 (*a*) and (*b*) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (*b*),

"(*a*) should this Court formulate detailed decrees in these cases;

"(*b*) if so, what specific issues should the decrees reach;

"(*c*) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

"(*d*) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

[14] See Rule 42, Revised Rules of this Court (effective July 1, 1954).

BROWN ET AL. *v.* BOARD OF EDUCATION OF TOPEKA ET AL.

NO 1. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.*

Reargued on the question of relief April 11–14, 1955.—Opinion and judgments announced May 31, 1955.

1. Racial discrimination in public education is unconstitutional, 347 U. S. 483, 497, and all provisions of federal, state or local law requiring or permitting such discrimination must yield to this principle. P. 298.
2. The judgments below (except that in the Delaware case) are reversed and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit the parties to these cases to public schools on a racially nondiscriminatory basis with all deliberate speed. P. 301.

   (a) School authorities have the primary responsibility for elucidating, assessing and solving the varied local school problems which may require solution in fully implementing the governing constitutional principles. P. 299.

   (b) Courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. P. 299.

   (c) Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. P. 299.

   (d) In fashioning and effectuating the decrees, the courts will be guided by equitable principles—characterized by a practical flexibility in shaping remedies and a facility for adjusting and reconciling public and private needs. P. 300.

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*Together with No. 2, *Briggs et al.* v. *Elliott et al.*, on appeal from the United States District Court for the Eastern District of South Carolina; No. 3, *Davis et al.* v. *County School Board of Prince Edward County, Virginia, et al.*, on appeal from the United States District Court for the Eastern District of Virginia; No. 4, *Bolling et al.* v. *Sharpe et al.*, on certiorari to the United States Court of Appeals for the District of Columbia Circuit; and No. 5, *Gebhart et al.* v. *Belton et al.*, on certiorari to the Supreme Court of Delaware.

(e) At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. P. 300.

(f) Courts of equity may properly take into account the public interest in the elimination in a systematic and effective manner of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles enunciated in 347 U. S. 483, 497; but the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them. P. 300.

(g) While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with the ruling of this Court. P. 300.

(h) Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. P. 300.

(i) The burden rests on the defendants to establish that additional time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. P. 300.

(j) The courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. Pp. 300–301.

(k) The courts will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. P. 301.

(l) During the period of transition, the courts will retain jurisdiction of these cases. P. 301.

3. The judgment in the Delaware case, ordering the immediate admission of the plaintiffs to schools previously attended only by white children, is affirmed on the basis of the principles stated by this Court in its opinion, 347 U. S. 483; but the case is remanded to the Supreme Court of Delaware for such further proceedings as that Court may deem necessary in the light of this opinion. P. 301.

98 F. Supp. 797, 103 F. Supp. 920, 103 F. Supp. 337 and judgment in No. 4, reversed and remanded.

91 A. 2d 137, affirmed and remanded.

Robert L. Carter argued the cause for appellants in No. 1. *Spottswood W. Robinson, III*, argued the causes for appellants in Nos. 2 and 3. *George E. C. Hayes* and *James M. Nabrit, Jr.* argued the cause for petitioners in No. 4. *Louis L. Redding* argued the cause for respondents in No. 5. *Thurgood Marshall* argued the causes for appellants in Nos. 1, 2 and 3, petitioners in No. 4 and respondents in No. 5.

On the briefs were *Harold Boulware, Robert L. Carter, Jack Greenberg, Oliver W. Hill, Thurgood Marshall, Louis L. Redding, Spottswood W. Robinson, III, Charles S. Scott, William T. Coleman, Jr., Charles T. Duncan, George E. C. Hayes, Loren Miller, William R. Ming, Jr., Constance Baker Motley, James M. Nabrit, Jr., Louis H. Pollak* and *Frank D. Reeves* for appellants in Nos. 1, 2 and 3, and respondents in No. 5; and *George E. C. Hayes, James M. Nabrit, Jr., George M. Johnson, Charles W. Quick, Herbert O. Reid, Thurgood Marshall* and *Robert L. Carter* for petitioners in No. 4.

Harold R. Fatzer, Attorney General of Kansas, argued the cause for appellees in No. 1. With him on the brief was *Paul E. Wilson*, Assistant Attorney General. *Peter F. Caldwell* filed a brief for the Board of Education of Topeka, Kansas, appellee.

S. E. Rogers and *Robert McC. Figg, Jr.* argued the cause and filed a brief for appellees in No. 2.

J. Lindsay Almond, Jr., Attorney General of Virginia, and *Archibald G. Robertson* argued the cause for appellees in No. 3. With them on the brief were *Henry T. Wickham*, Special Assistant to the Attorney General, *T. Justin Moore, John W. Riely* and *T. Justin Moore, Jr.*

Milton D. Korman argued the cause for respondents in No. 4. With him on the brief were *Vernon E. West, Chester H. Gray* and *Lyman J. Umstead.*

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Joseph Donald Craven, Attorney General of Delaware, argued the cause for petitioners in No. 5. On the brief were *H. Albert Young*, then Attorney General, *Clarence W. Taylor*, Deputy Attorney General, and *Andrew D. Christie*, Special Deputy to the Attorney General.

In response to the Court's invitation, 347 U. S. 483, 495–496, *Solicitor General Sobeloff* participated in the oral argument for the United States. With him on the brief were *Attorney General Brownell, Assistant Attorney General Rankin, Philip Elman, Ralph S. Spritzer* and *Alan S. Rosenthal.*

By invitation of the Court, 347 U. S. 483, 496, the following State officials presented their views orally as *amici curiae: Thomas J. Gentry*, Attorney General of Arkansas, with whom on the brief were *James L. Sloan*, Assistant Attorney General, and *Richard B. McCulloch*, Special Assistant Attorney General. *Richard W. Ervin*, Attorney General of Florida, and *Ralph E. Odum*, Assistant Attorney General, both of whom were also on a brief. *C. Ferdinand Sybert*, Attorney General of Maryland, with whom on the brief were *Edward D. E. Rollins*, then Attorney General, *W. Giles Parker*, Assistant Attorney General, and *James H. Norris, Jr.*, Special Assistant Attorney General. *I. Beverly Lake*, Assistant Attorney General of North Carolina, with whom on the brief were *Harry McMullan*, Attorney General, and *T. Wade Bruton, Ralph Moody* and *Claude L. Love*, Assistant Attorneys General. *Mac Q. Williamson*, Attorney General of Oklahoma, who also filed a brief. *John Ben Shepperd*, Attorney General of Texas, and *Burnell Waldrep*, Assistant Attorney General, with whom on the brief were *Billy E. Lee, J. A. Amis, Jr., L. P. Lollar, J. Fred Jones, John Davenport, John Reeves* and *Will Davis.*

Phineas Indritz filed a brief for the American Veterans Committee, Inc., as *amicus curiae.*

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases were decided on May 17, 1954. The opinions of that date,[1] declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference. All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle. There remains for consideration the manner in which relief is to be accorded.

Because these cases arose under different local conditions and their disposition will involve a variety of local problems, we requested further argument on the question of relief.[2] In view of the nationwide importance of the decision, we invited the Attorney General of the United

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[1] 347 U. S. 483; 347 U. S. 497.

[2] Further argument was requested on the following questions, 347 U. S. 483, 495–496, n. 13, previously propounded by the Court:

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(*a*) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(*b*) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

"5. On the assumption on which questions 4 (*a*) and (*b*) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (*b*),

"(*a*) should this Court formulate detailed decrees in these cases;

"(*b*) if so, what specific issues should the decrees reach;

"(*c*) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

"(*d*) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

States and the Attorneys General of all states requiring or permitting racial discrimination in public education to present their views on that question. The parties, the United States, and the States of Florida, North Carolina, Arkansas, Oklahoma, Maryland, and Texas filed briefs and participated in the oral argument.

These presentations were informative and helpful to the Court in its consideration of the complexities arising from the transition to a system of public education freed of racial discrimination. The presentations also demonstrated that substantial steps to eliminate racial discrimination in public schools have already been taken, not only in some of the communities in which these cases arose, but in some of the states appearing as *amici curiae*, and in other states as well. Substantial progress has been made in the District of Columbia and in the communities in Kansas and Delaware involved in this litigation. The defendants in the cases coming to us from South Carolina and Virginia are awaiting the decision of this Court concerning relief.

Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.[8]

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[8] The cases coming to us from Kansas, South Carolina, and Virginia were originally heard by three-judge District Courts convened under 28 U. S. C. §§ 2281 and 2284. These cases will accordingly be remanded to those three-judge courts. See *Briggs* v. *Elliott*, 342 U. S. 350.

In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies [4] and by a facility for adjusting and reconciling public and private needs.[5] These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools

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[4] See *Alexander* v. *Hillman*, 296 U. S. 222, 239.

[5] See *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329–330.

on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.

The judgments below, except that in the Delaware case, are accordingly reversed and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases. The judgment in the Delaware case—ordering the immediate admission of the plaintiffs to schools previously attended only by white children—is affirmed on the basis of the principles stated in our May 17, 1954, opinion, but the case is remanded to the Supreme Court of Delaware for such further proceedings as that Court may deem necessary in light of this opinion.

It is so ordered.

GONG LUM ET AL. *v.* RICE ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 29. Submitted October 12, 1927.—Decided November 21, 1927.

A child of Chinese blood, born in, and a citizen of, the United States, is not denied the equal protection of the laws by being classed by the State among the colored races who are assigned to public schools separate from those provided for the whites, when equal facilities for education are afforded to both classes. P. 85.

139 Miss. 760, affirmed.

ERROR to a judgment of the Supreme Court of Mississippi, reversing a judgment awarding the writ of mandamus. The writ was applied for in the interest of Martha Lum, a child of Chinese blood, born in the United States, and was directed to the trustees of a high school district and the State Superintendant of Education, commanding them to cease discriminating against her and to admit her to the privileges of the high school specified, which was assigned to white children exclusively.

Messrs. J. N. Flowers, Earl Brewer, and *Edward C. Brewer* for plaintiff in error.

The white, or Caucasian, race, which makes the laws and construes and enforces them, thinks that in order to protect itself against the infusion of the blood of other races its children must be kept in schools from which other races are excluded. The classification is made for the exclusive benefit of the law-making race. The basic assumption is that if the children of two races associate daily in the school room the two races will at last intermix; that the purity of each is jeopardized by the mingling of the children in the school room; that such association among children means social intercourse and social equality. This danger, the white race, by its laws, seeks to divert from itself. It levies the taxes on all alike to

support a public school system, but in the organization of the system it creates its own exclusive schools for its children, and other schools for the children of all other races to attend together.

If there is danger in the association, it is a danger from which one race is entitled to protection just the same as another. The white race may not legally expose the yellow race to a danger that the dominant race recognizes and, by the same laws, guards itself against. The white race creates for itself a privilege that it denies to other races; exposes the children of other races to risks and dangers to which it would not expose its own children. This is discrimination. *Lehew* v. *Brummell*, 103 Mo. 549; *Strauder* v. *West Virginia*, 100 U. S. 303.

Color may reasonably be used as a basis for classification only in so far as it indicates a particular race. Race may reasonably be used as a basis. "Colored" describes only one race, and that is the negro. *State* v. *Treadway*, 126 La. 52; *Lehew* v. *Brummell, supra; Plessy* v. *Ferguson*, 163 U. S. 537; *Berea College* v. *Kentucky*, 133 Ky. 209; *West Chester R. R.* v. *Miles*, 55 Pa. St. 209; *Tucker* v. *Blease*, 97 S. C. 303.

Messrs. Rush H. Knox, Attorney General of Mississippi, and *E. C. Sharp* for defendants in error.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This was a petition for mandamus filed in the state Circuit Court of Mississippi for the First Judicial District of Bolivar County.

Gong Lum is a resident of Mississippi, resides in the Rosedale Consolidated High School District, and is the father of Martha Lum. He is engaged in the mercantile business. Neither he nor she was connected with the consular service or any other service of the government of China, or any other government, at the time of her birth.

She was nine years old when the petition was filed, having been born January 21, 1915, and she sued by her next friend, Chew How, who is a native born citizen of the United States and the State of Mississippi. The petition alleged that she was of good moral character and between the ages of five and twenty-one years, and that, as she was such a citizen and an educable child, it became her father's duty under the law to send her to school; that she desired to attend the Rosedale Consolidated High School; that at the opening of the school she appeared as a pupil, but at the noon recess she was notified by the superintendent that she would not be allowed to return to the school; that an order had been issued by the Board of Trustees, who are made defendants, excluding her from attending the school solely on the ground that she was of Chinese descent and not a member of the white or Caucasian race, and that their order had been made in pursuance to instructions from the State Superintendent of Education of Mississippi, who is also made a defendant.

The petitioners further show that there is no school maintained in the District for the education of children of Chinese descent, and none established in Bolivar County where she could attend.

The Constitution of Mississippi requires that there shall be a county common school fund, made up of poll taxes from the various counties, to be retained in the counties where the same is collected, and a state common school fund to be taken from the general fund in the state treasury, which together shall be sufficient to maintain a common school for a term of four months in each scholastic year, but that any county or separate school district may levy an additional tax to maintain schools for a longer time than a term of four months, and that the said common school fund shall be distributed among the several counties and separate school districts in proportion to the number of educable children in each, to be collected

from the data in the office of the State Superintendent of Education in the manner prescribed by law; that the legislature encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement, by the establishment of a uniform system of free public schools by taxation or otherwise, for all children between the ages of five and twenty-one years, and, as soon as practicable, establish schools of higher grade.

The petition alleged that, in obedience to this mandate of the Constitution, the legislature has provided for the establishment and for the payment of the expenses of the Rosedale Consolidated High School, and that the plaintiff, Gong Lum, the petitioner's father, is a taxpayer and helps to support and maintain the school; that Martha Lum is an educable child, is entitled to attend the school as a pupil, and that this is the only school conducted in the District available for her as a pupil; that the right to attend it is a valuable right; that she is not a member of the colored race nor is she of mixed blood, but that she is pure Chinese; that she is by the action of the Board of Trustees and the State Superintendent discriminated against directly and denied her right to be a member of the Rosedale School; that the school authorities have no discretion under the law as to her admission as a pupil in the school, but that they continue without authority of law to deny her the right to attend it as a pupil. For these reasons the writ of mandamus is prayed for against the defendants commanding them and each of them to desist from discriminating against her on account of her race or ancestry and to give her the same rights and privileges that other educable children between the ages of five and twenty-one are granted in the Rosedale Consolidated High School.

The petition was demurred to by the defendants on the ground, among others, that the bill showed on its face that plaintiff is a member of the Mongolian or yellow race, and

therefore not entitled to attend the schools provided by law in the State of Mississippi for children of the white or Caucasian race.

The trial court overruled the demurrer and ordered that a writ of mandamus issue to the defendants as prayed in the petition.

The defendants then appealed to the Supreme Court of Mississippi, which heard the case. *Rice* v. *Gong Lum*, 139 Miss. 760. In its opinion, it directed its attention to the proper construction of § 207 of the State Constitution of 1890, which provides:

"Separate schools shall be maintained for children of the white and colored races."

The Court held that this provision of the Constitution divided the educable children into those of the pure white or Caucasian race, on the one hand, and the brown, yellow and black races, on the other, and therefore that Martha Lum of the Mongolian or yellow race could not insist on being classed with the whites under this constitutional division. The Court said:

"The legislature is not compelled to provide separate schools for each of the colored races, and, unless and until it does provide such schools and provide for segregation of the other races, such races are entitled to have the benefit of the colored public schools. Under our statutes a colored public school exists in every county and in some convenient district in which every colored child is entitled to obtain an education. These schools are within the reach of all the children of the state, and the plaintiff does not show by her petition that she applied for admission to such schools. On the contrary the petitioner takes the position that because there are no separate public schools for Mongolians that she is entitled to enter the white public schools in preference to the colored public schools. A consolidated school in this state is simply a common school conducted as other common schools are conducted;

the only distinction being that two or more school districts have been consolidated into one school. Such consolidation is entirely discretionary with the county school board having reference to the condition existing in the particular territory. Where a school district has an unusual amount of territory, with an unusual valuation of property therein, it may levy additional taxes. But the other common schools under similar statutes have the same power.

"If the plaintiff desires, she may attend the colored public schools of her district, or, if she does not so desire, she may go to a private school. The compulsory school law of this state does not require the attendance at a public school, and a parent under the decisions of the Supreme Court of the United States has a right to educate his child in a private school if he so desires. But plaintiff is not entitled to attend a white public school."

As we have seen, the plaintiffs aver that the Rosedale Consolidated High School is the only school conducted in that district available for Martha Lum as a pupil. They also aver that there is no school maintained in the district of Bolivar County for the education of Chinese children and none in the county. How are these averments to be reconciled with the statement of the State Supreme Court that colored schools are maintained in every county by virtue of the Constitution? This seems to be explained, in the language of the State Supreme Court, as follows:

"By statute it is provided that all the territory of each county of the state shall be divided into school districts separately for the white and colored races; that is to say, the whole territory is to be divided into white school districts, and then a new division of the county for colored school districts. In other words, the statutory scheme is to make the districts outside of the separate school districts, districts for the particular race, white or colored, so that the territorial limits of the school districts need

not be the same, but the territory embraced in a school district for the colored race may not be the same territory embraced in the school district for the white race, and *vice versa*, which system of creating the common school districts for the two races, white and colored, does not require schools for each race as such to be maintained in each district, but each child, no matter from what territory, is assigned to some school district, the school buildings being separately located and separately controlled, but each having the same curriculum, and each having the same number of months of school term, if the attendance is maintained for the said statutory period, which school district of the common or public schools has certain privileges, among which is to maintain a public school by local taxation for a longer period of time than the said term of four months under named conditions which apply alike to the common schools for the white and colored races."

We must assume then that there are school districts for colored children in Bolivar County, but that no colored school is within the limits of the Rosedale Consolidated High School District. This is not inconsistent with there being, at a place outside of that district and in a different district, a colored school which the plaintiff Martha Lum, may conveniently attend. If so, she is not denied, under the existing school system, the right to attend and enjoy the privileges of a common school education in a colored school. If it were otherwise, the petition should have contained an allegation showing it. Had the petition alleged specifically that there was no colored school in Martha Lum's neighborhood to which she could conveniently go, a different question would have been presented, and this, without regard to the State Supreme Court's construction of the State Constitution as limiting the white schools provided for the education of children of the white or Caucasian race. But we do not find the petition to present such a situation.

The case then reduces itself to the question whether a state can be said to afford to a child of Chinese ancestry born in this country, and a citizen of the United States, equal protection of the laws by giving her the opportunity for a common school education in a school which receives only colored children of the brown, yellow or black races.

The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear. In *Cumming* v. *Richmond County Board of Education*, 175 U. S. 528, 545, persons of color sued the Board of Education to enjoin it from maintaining a high school for white children without providing a similar school for colored children which had existed and had been discontinued. Mr. Justice Harlan, in delivering the opinion of the Court, said:

"Under the circumstances disclosed, we cannot say that this action of the state court was, within the meaning of the Fourteenth Amendment, a denial by the State to the plaintiffs and to those associated with them of the equal protection of the laws, or of any privileges belonging to them as citizens of the United States. We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools can not be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."

The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black. Were this a new question,

it would call for very full argument and consideration, but we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution. *Roberts* v. *City of Boston*, 5 Cush. (Mass.) 198, 206, 208, 209; *State ex rel. Garnes* v. *McCann*, 21 Oh. St. 198, 210; *People ex rel. King* v. *Gallagher*, 93 N. Y. 438; *People ex rel. Cisco* v. *School Board*, 161 N. Y. 598; *Ward* v. *Flood*, 48 Cal. 36; *Wysinger* v. *Crookshank*, 82 Cal. 588, 590; *Reynolds* v. *Board of Education*, 66 Kans. 672; *McMillan* v. *School Committee*, 107 N. C. 609; *Cory* v. *Carter*, 48 Ind. 327; *Lehew* v. *Brummell*, 103 Mo. 546; *Dameron* v. *Bayless*, 14 Ariz. 180; *State ex rel. Stoutmeyer* v. *Duffy*, 7 Nev. 342, 348, 355; *Bertonneau* v. *Board*, 3 Woods 177, s. c. 3 Fed. Cases, 294, Case No. 1,361; *United States* v. *Buntin*, 10 Fed. 730, 735; *Wong Him* v. *Callahan*, 119 Fed. 381.

In *Plessy* v. *Ferguson*, 163 U. S. 537, 544, 545, in upholding the validity under the Fourteenth Amendment of a statute of Louisiana requiring the separation of the white and colored races in railway coaches, a more difficult question than this, this Court, speaking of permitted race separation, said:

"The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."

The case of *Roberts* v. *City of Boston*, *supra*, in which Chief Justice Shaw of the Supreme Judicial Court of Massachusetts, announced the opinion of that court upholding the separation of colored and white schools under

a state constitutional injunction of equal protection, the same as the Fourteenth Amendment, was then referred to, and this Court continued:

"Similar laws have been enacted by Congress under its general power of legislation over the District of Columbia, Rev. Stat. D. C. §§ 281, 282, 283, 310, 319, as well as by the legislatures of many of the States, and have been generally, if not uniformly, sustained by the Courts," citing many of the cases above named.

Most of the cases cited arose, it is true, over the establishment of separate schools as between white pupils and black pupils, but we can not think that the question is any different or that any different result can be reached, assuming the cases above cited to be rightly decided, where the issue is as between white pupils and the pupils of the yellow races. The decision is within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment. The judgment of the Supreme Court of Mississippi is

Affirmed.

COMPANIA GENERAL DE TABACOS DE FILIPINAS *v.* COLLECTOR OF INTERNAL REVENUE.

CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 42. Argued October 18, 19, 1927.—Decided November 21, 1927.

1. A foreign corporation which has property and does business through agents in the Philippine Islands is subject to the taxing power of the Island government as a quasi sovereign, but the power is limited by the Organic Act. P. 92.
2. The liberty secured by the Organic Act embraces the right to make contracts and accumulate property and do business outside of the Philippine Islands and beyond its jurisdiction without prohibition, regulation, or governmental exaction. P. 92.

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